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Vol. III-A.

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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1938

No. 2

KELLOGG COMPANY, PETITIONER,

vs.

NATIONAL BISCUIT COMPANY.

No. 56

KELLOGG COMPANY, PETITIONER,

vs.

NATIONAL BISCUIT COMPANY.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE THIRD CIRCUIT.

PETITIONS FOR CERTIORARI FILED { SEPTEMBER 10, 1937.
MAY 23, 1938.

CERTIORARI GRANTED MAY 31, 1938.

TRANSCRIPT OF RECORD

(IN FIVE VOLUMES)

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 5801.

October Term, 1935.

NATIONAL BISCUIT COMPANY,

Plaintiff-Appellant,

v.

KELLOGG COMPANY,

Defendant-Appellee.

Volume III-a.

Proceedings in Circuit Court of Appeals.

(Pages 2067 to 2243 inclusive)

APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE DISTRICT OF DELAWARE.

Filed August 11, 1937.

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REFERENCE TO ARGUMENT.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS,
FOR THE THIRD CIRCUIT.

No. 5801. October Term, 1935.

NATIONAL BISCUIT COMPANY,
Plaintiff-Appellant,
v.
KELLOGG COMPANY,
Defendant-Appellee.

And afterwards, to wit, the third day of December, 1935, come the parties aforesaid by their counsel aforesaid, and this case being called for argument sur pleadings and briefs, before the Honorable Joseph Buffington, Honorable J. Warren Davis and Honorable J. Whitaker Thompson, Circuit Judges, and the Court not being fully advised in the premises, takes further time for the consideration thereof,

And afterwards, to wit, on the sixteenth day of January, 1936, come the parties aforesaid by their counsel aforesaid, and the Court, now being fully advised in the premises, renders the following decision:



IN THE

UNITED STATES CIRCUIT COURT OF APPEALS,
FOR THE THIRD CIRCUIT.

No. 5801. October Term, 1935.

NATIONAL BISCUIT COMPANY,
Plaintiff-Appellant,

v.

KELLOGG COMPANY,
Defendant-Appellee.

APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE DISTRICT OF DELAWARE.

OPINION.

(Filed January 16, 1936.)

Before BUFFINGTON, DAVIS and THOMPSON, *Circuit
Judges.*

Per Curiam:

As stated by the court below, "the bill charges unfair competition. It avers that plaintiff is vested with the exclusive right to whole wheat biscuit made in a particular and distinctive shape, appearance and structure; to the name 'Shredded' and 'Shredded Wheat' in connection with whole wheat biscuit; and to the representation or picture of whole wheat biscuit made in a particular and distinctive shape, appearance and structure generally and shown in a saucer or dish"

After proofs, that court filed an opinion which discussed in great detail the questions involved and, in pursuance thereof, entered a decree dismissing the bill. Whereupon plaintiff took this appeal.

After due consideration had of all questions raised in the cause, we are of opinion no error was committed and the judgment below should be affirmed. In view of the full and satisfactory discussion by the trial court of all issues involved, we find no occasion to write a further opinion and, with a view to avoiding needless repetition, we confine ourselves to stating that on the expiration of plaintiff's patent No. 548,086, the exclusive right to make and sell the food product therein described ended. And on the expiration of plaintiff's design patent No. 24,688, the exclusive right to the designed biscuit also ceased. In that regard we agree with the Judge below, namely:

"In this case plaintiff claims in perpetuity the monopolistic right to the descriptive word 'shredded' and a monopolistic right in the shape or form of the biscuit. Any right of plaintiff must be based upon the wrong of defendant. Relief must be based upon confusion or palming off, otherwise relief should be denied. Originally patents covered every phase of plaintiff's business. There were product, process and design patents which secured plaintiff a perfect monopoly of the business. These patents have expired and *the case falls into the class of expired patent cases* and is controlled by the Singer case."

The food product which was covered by these patents was made by the mangling or, as they called it, shredding of wheat in the process and the product was given the form of an elongated, circular topped biscuit which was described by them as shredded wheat and became known to the trade and consumers by the descriptive words "shredded wheat". However closely

that term may have become associated with the plaintiff's business during the life of its patents, the fact remains that on the expiration of the patents, the public could use the patented process both in making the patented product and in making it in the form described in the design patent and in calling it "shredded", provided in doing so it avoided simulating the product so as to prevent confusion and lead buyers into the belief they were buying plaintiff's product. This, in the judgment of the court below and of this court, the defendant has done in compliance with the requirements of Singer v. June, 163 U. S. 169, for the product of the defendant has at all times, in its cartons and otherwise, been marked with its own name, in words and colors (green and red) of such distinctive character, that buyers thereof knew they were getting defendant's product and were not buying that of the plaintiff. Moreover, it is clear that the word "shredded" was a descriptive word, aptly describing the process to which wheat grains were subject by any one using shredding or mangling in processing wheat grains. It is clear, therefore, the use of the word "shredded" is open to all shredders of wheat, provided that in the use of the descriptive word "shredded", they so use the said word "shredded" as not to mislead and confuse the public into the belief that they are buying the product of some other shredder. Now, that no confusion, misleading or deceit is shown in this case, is clear. In that regard we agree with the court's summary:

"Where the name is the only name by which the article can be described and is the only name by which it was described during the existence of the patent that name becomes public property upon the expiration of the patent. Here the patented biscuit was known as Shredded Wheat or Shredded Wheat Biscuit. Upon the expiration of the patent that name became public property.

Evidence that Shredded Wheat or Shredded Wheat Biscuit has been understood by the public for years to mean a product produced only by the plaintiff does not establish plaintiff's right to that name. Where a secondary meaning is established even to the exclusion of any other meaning, a competitor has the right to use that name provided he clearly distinguishes his goods. So where a man distinguishes his goods he has fulfilled his duty to his competitors and to the public. What normal person desiring plaintiff's biscuit would take defendant's package and think he was getting plaintiff's package. Or what person seeing defendant's package would think it was plaintiff's package. Such confusion can not be inferred from the circumstances of the case and there is no proof of it.

The testimony of a hundred witnesses from all parts of the country establishes there was no passing off of defendant's biscuit for plaintiff's or deception of the public to any appreciable extent."

So regarding, the decree below is affirmed.

A true Copy:

Taste:

*Clerk of the United States Circuit Court of Appeals
for the Third Circuit.*

ORDER AFFIRMING DECREE.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS,
FOR THE THIRD CIRCUIT.

No. 5801. October Term, 1935.

NATIONAL BISCUIT COMPANY,
Plaintiff-Appellant,

v.

KELLOGG COMPANY,
Defendant-Appellee.

APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE DISTRICT OF DELAWARE.

This cause came on to be heard on the transcript of record from the District Court of the United States, for the District of Delaware, and was argued by counsel.

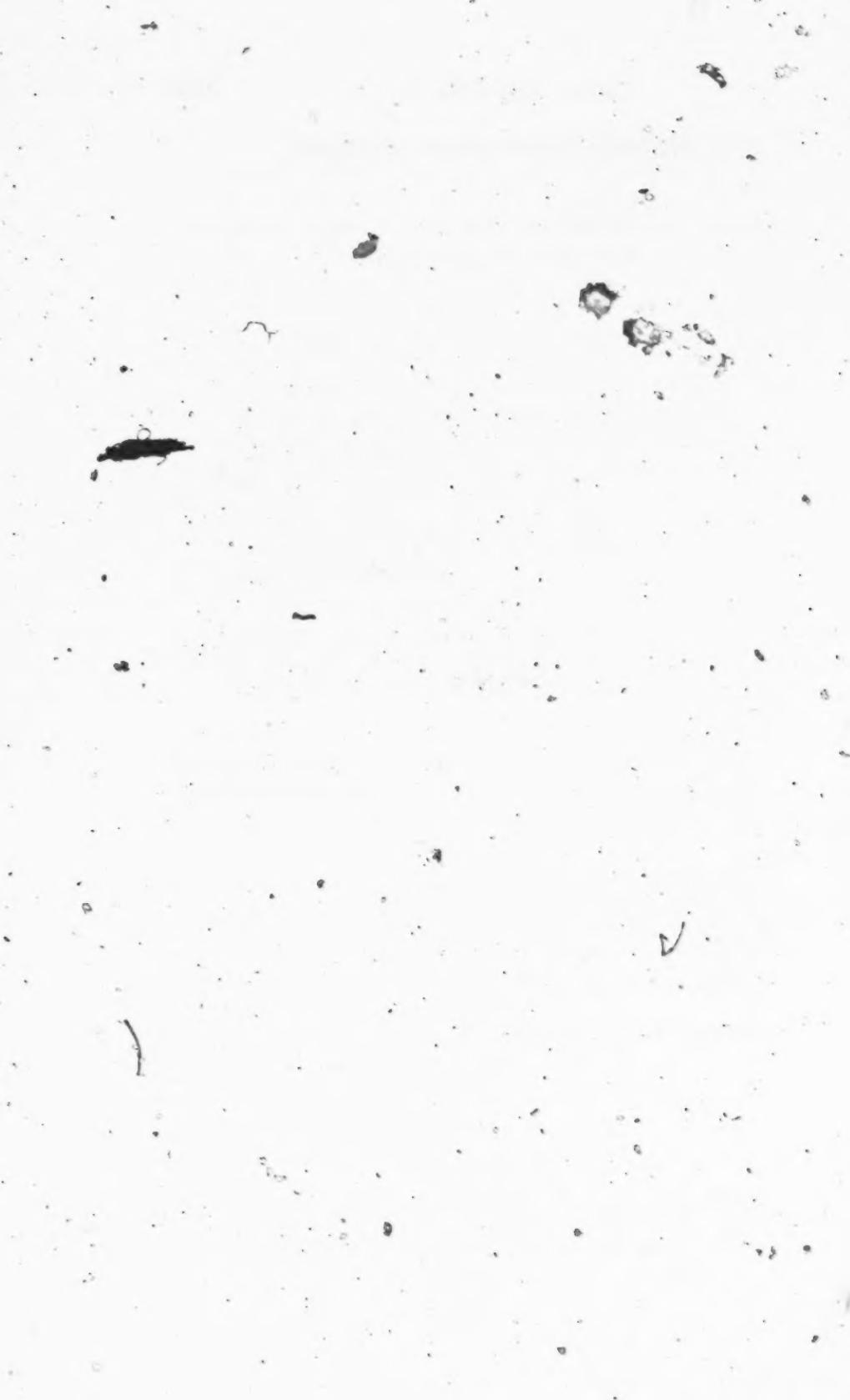
On consideration whereof, it is now here ordered, adjudged, and decreed by this Court that the decree of the said District Court in this cause, be, and the same is hereby affirmed, with costs.

Philadelphia, January 16, 1936.

Per Curiam,

BUFFINGTON,
Circuit Judge.

(Endorsements): Order Affirming Decree Received & Filed Jan. 16, 1936 Wm. P. Rowland, Clerk.



PETITION FOR RE-HEARING.

(Filed February 15, 1936.)

IN THE UNITED STATES CIRCUIT COURT OF APPEALS,
FOR THE THIRD CIRCUIT,

No. 5801. October Term, 1935.

National Biscuit Company,
Appellant,
against

Kellogg Company,
Appellee.

The appellant above named respectfully prays this Court for a re-hearing of this cause. The grounds for this request are as follows:

1. The Court adopts the ruling of the District Court that, because certain patents covering the process and machinery used in the plaintiff's business have expired, the case thereby falls into the class of expired patent cases and is controlled by the case of *Singer Manufacturing Co. v. June Manufacturing Co.*, 163 U. S. 169. We believe the Court did not give sufficient weight to the fact that while these patents expired in 1912 it was not until 1927, fifteen years later, that the defendant seriously undertook to avail itself not only of the patented process and the machinery, but also of the plaintiff's trade name and the good will which had been created for it by the expenditure of at least \$17,000,000 after the expiration of the patent. We feel that this point was not sufficiently stressed upon our brief and possibly not in the oral argument which turned upon other phases of the case. The courts in the Second Circuit and the Court of Appeals for the District of Columbia (*Scandinavia Belting Co. v. As-*

bestos & Rubber Works, 257 Fed. 937 (C. C. A. 2d); *McKesson & Robbins v. Phillips Chemical Co.*, 23 Fed. (2d) 763 (C. A. Dist. Col.); and *Dupont Cellophane Co. v. Waxed Products Co.*, 6 Fed. Supp. 859 (D. C. E. D. N. Y.) apparently recognized that Congress in the Trade Mark Act of 1905 (U. S. C. Title 15, Sec. 85) had enunciated a public policy to the effect that a trade mark which otherwise might be invalid should be afforded judicial protection if it had been used in interstate commerce exclusively by the owner or its predecessors for ten years or more. In the quotation from *Scandinavia Belting Co. v. Asbestos & Rubber Works, supra*, found in appellant's brief at page 95, reference is made to the registration of the trade mark under the ten years' clause. In *Thaddeus Davids Co. v. Davids & Davids*, 233 U. S. 461 at page 470, the Supreme Court says:

"Their exclusive use as trade-marks for the stated period was deemed in the judgment of Congress a sufficient assurance that they had acquired a secondary meaning as the designation of the origin or ownership of the merchandise to which they were affixed. And it was manifestly in this limited character only that they received a statutory recognition, and, on registration, became entitled to protection under the act."

We urge that the foregoing authorities may be properly construed as recognizing that Congress by the Act of 1905 enunciated a public policy applicable to all trade marks used in interstate commerce exclusively by the owner for ten years or more, and that such public policy should be applied by all Federal Courts as to trade marks used in interstate commerce. Trade marks in the present day of extensive advertising play such an important part in commerce, and unfair competition has increasingly taken on such

subtle and varied forms and is so rampant, that we respectfully submit that this court should examine and decide the question which we thus raise, as well as that to be now stated.

If the Act of 1905 may not be fairly said to be declaratory of a public policy, still under general equitable principles we submit that the application of the doctrine of *Singer v. June* to the case at bar was an unjustified and an unwarranted extension of that doctrine, entirely out of harmony with the recent decision of the Supreme Court to be referred to (*post*, p. 4). No one, for fifteen years after the expiration of the patent, sought to use the name "Shredded Wheat", and then only this defendant. Meanwhile appellant had spent in advertising substantially more than \$17,000,000, the inevitable effect of which was to connect the product "Shredded Wheat" with petitioner. What possible equitable consideration entitles this defendant to avail itself of plaintiff's good will created not only by the vast sums expended for advertising (\$16,000,000 during the life of the patent and \$17,000,000 during the next fifteen years) (Ex. 84, R. Vol. IV, p. 41; Ex. 150 (*ibid.*), p. 51) but by the almost universal recognition of the excellent quality of the product and its healthful properties?

2. The Court in its opinion states that the food product covered by the patents "was given the form of an elongated circular topped biscuit" and that "however closely that term may have become associated with the plaintiff's business during the life of its patents, the fact remains that upon the expiration of the patents, the public could use the patented process both in making the patented product and in making it in the form described in the design patent and in calling it 'shredded'." We believe that, doubtless because of omission to press the point in oral argument, the Court

overlooked the important consideration that the process patent No. 548,086 in this case falls short of producing the "elongated circular topped biscuit" which became known as "Shredded Wheat" (see appellant's original brief, pages 7 to 10 inclusive and pages 92 and 93) (*ibid.*, p. 81).

3. Upon the expiration of a patent there falls into the public domain only what is covered by the patent. The expiration of a patent does not carry with it the patentee's good will and other intangibles. The defendant here seeks to take more than the patent included, to wit, petitioner's good will admittedly worth many millions of dollars. This is unnecessary to the full enjoyment of the patent as is proven by the Quaker Oats Company which for years has used the process patent to produce "Muffets", a product clearly distinguishable from the plaintiff's both in name and appearance.

4. The Court also, we believe, overlooked the ruling of the Circuit Court of Appeals for the Second Circuit in *President Suspender Co. v. MacWilliams*, 238 Fed. 159 (certiorari denied, 243 U. S. 646) holding that the use of a name prior to the issuance of a patent prevents the application of the doctrine of *Singer v. June*, although the Court recognized the force of this doctrine in *Amiesite Asphalt Co. of America v. Interstate Amiesite Co.*, 72 Fed. (2d) 946.

5. The modern doctrine of unfair competition has been stated by the United States Supreme Court to cover not only misrepresentation but also "misappropriation of what equitably belongs to a competitor" (*Schechter Poultry Corporation v. United States*, 295 U. S. 495 at page 532). We have here a case of a staple article of food, the name of which has become

a household word throughout the United States and Canada. The supposed claim of the plaintiff to a monopoly has been stressed to the exclusion of due consideration of the rights of the public to protection. For nearly forty years the plaintiff and its predecessors have furnished a service to the public and the public has learned to call for the plaintiff's service by the name "Shredded Wheat" and to expect to receive upon such call the very article with which it has during all those years been served. Whether these words be descriptive, or not registerable as a trade mark for any other reason, they have been respected throughout the years by all competitors but the defendant, and public policy demands some measure of protection for the consumer. This was recognized by the Circuit Court of Appeals for the Second Circuit nearly twenty years ago in *Shredded Wheat v. Humphrey-Cornell Co.*, 250 Fed. 960 (vid. appellant's brief, p. 77), but this important consideration appears to have been overlooked in this case and undue emphasis laid upon the supposed monopoly which might result to the plaintiff; but we have pointed out that the plaintiff seeks and can obtain no monopoly and this is proven by the fact that it already has two strong competitors in the manufacture of the Perky biscuit who have not found it necessary in enjoying the fruits of the patent to appropriate also the plaintiff's good will.

Respectfully submitted,

HUGH M. MORRIS,

DRURY W. COOPER,

THOMAS G. HAIGHT,

CHARLES A. VILAS,

Counsel for Appellant.

February 14, 1936.

*Petition for Re-Hearing**Certificate of Counsel.*

I, CHARLES A. VILAS, one of the counsel for appellant, hereby certify that I believe the foregoing petition for rehearing to be well founded in law and in fact and that it is not interposed for the purpose of delay.

CHARLES A. VILAS;
Of Counsel for Appellant.

 Order Granting Petition for Rehearing 2081

ORDER GRANTING PETITION FOR REHEARING.

(Filed May 7, 1936.)

IN THE UNITED STATES CIRCUIT COURT OF APPEALS,
FOR THE THIRD CIRCUIT.

No. 5801. October Term, 1935.

National Biscuit Company,
Plaintiff-Appellant,

v.

Kellogg Company,
Defendant-Appellee.

SUR PETITION FOR REHEARING.

AND Now, to wit, May 7, 1936, after due consideration, the petition for rehearing in the above-entitled case is hereby granted.

Philadelphia,
May 7, 1936.

JOSEPH BUFFINGTON,
Circuit Judge.

REFERENCE TO REARGUMENT.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS,
FOR THE THIRD CIRCUIT.

No. 5801. October Term, 1935.

National Biscuit Company,
Plaintiff-Appellant,
v.

Kellogg Company,
Defendant-Appellee.

And afterwards, to wit, the eighth day of October, 1936, come the parties aforesaid by their counsel aforesaid, and this case being called for reargument sur pleadings and briefs, before the Honorable Joseph Buffington, Honorable J. Warren Davis and Honorable J. Whitaker Thompson, Circuit Judges, and the Court not being fully advised in the premises, takes further time for the consideration thereof,

And afterwards, to wit, on the twelfth day of April, 1937, come the parties aforesaid by their counsel aforesaid, and the Court, now being fully advised in the premises, renders the following decision:

IN THE
UNITED STATES CIRCUIT COURT OF APPEALS,
FOR THE THIRD CIRCUIT.

No. 5801. October Term, 1935.

NATIONAL BISCUIT COMPANY,
Plaintiff-Appellant,

v.
KELLOGG COMPANY,
Defendant-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF DELAWARE.

OPINION ON REARGUMENT.

(Filed April 12, 1937.)

Before BUFFINGTON, DAVIS and THOMPSON, *Circuit Judges.*

DAVIS, *Circuit Judge.*

When this case was here before we affirmed the decree of the District Court by a per curiam adopting the opinion of that court. It is before us now on reargument. The District Court and this court felt that the case was controlled by *Singer v. June*, 163 U. S. 169, on the ground that the name, "Shredded Wheat" was a descriptive term, describing the product of the plaintiff and that, in any event, upon the expiration of the Perky patent No. 548,086, issued October 5, 1895, the name passed into the public domain, remained there

and became public property. Consequently we held that the appellant, hereinafter called plaintiff, did not have the right to the exclusive use of the name.

After exhaustively reviewing the authorities, Mr. Justice White in *Singer v. June*, *supra*, declared the law on this subject to be as follows:

"The result, then, of the American, the English and the French doctrine universally upheld is this, that where, during the life of a monopoly created by a patent, a name, whether it be arbitrary or be that of the inventor, has become, by his consent, either express or tacit, the identifying and generic name of the thing patented, this name passes to the public with the cessation of the monopoly which the patent created. Where another avails himself of this public dedication to make the machine and use the generic designation, he can do so in all forms, with the fullest liberty, by affixing such name to the machines, by referring to it in advertisements and by other means, subject, however, to the condition that the name must be so used as not to deprive others of their rights or to deceive the public, and, therefore, that the name must be accompanied with such indications that the thing manufactured is the work of the one making it, as will unmistakably inform the public of that fact."

Therefore, upon the expiration of the patent the defendant was free to adopt the name of "Shredded Wheat" to designate its product with some adequate explanation that the product was made by it and not by the plaintiff. This, however, it did not do, but waited ten years and then when it attempted to do so immediately stopped upon complaint of the plaintiff and did not start again for five years.

In or about the year 1893 Henry D. Perky put into commercial use a new process for a form of food manufactured out of whole wheat and called the product "Shredded Wheat". The evidence shows that the

process consisted in cleaning, curing, drying and boiling the wheat and thereafter passing the softened grains between two rollers. The surface of one of these was flat and the other contained grooves. The rollers exerted great pressure upon the wheat which came out in long filaments or threads which were later cut, made in the form of a pillow-shaped biscuit; placed in an oven at a temperature of approximately 500 degrees Fahrenheit and baked until all but a small percentage of the moisture had been removed. The biscuits were then sold under the name of "Shredded Wheat", and "Shredded Wheat Biscuit".

With the exception of the Ross Company, for a short time in 1915, and the defendant, for a short time in 1922, no one, in the fifteen years after the expiration of the patent, used the name "Shredded Wheat", to designate his product and they both immediately stopped on complaint of plaintiff.

In 1927, however, the defendant began again to manufacture biscuits and sell them under the name of "Shredded Whole Wheat Biscuit". Suit was brought against it in the District Court of Connecticut. While that suit was pending, the defendant in 1930 abandoned the name of "Shredded Wheat" to designate its product and instead used the name of "Kellogg's Whole Wheat Biscuit". Thereupon the suit was discontinued.

But in 1932, the defendant started to use in its advertisements the name "Shredded Wheat" and the plaintiff's trademark consisting of a dish, containing two biscuits submerged in milk, to identify its product.

During that period of fifteen years, after the expiration of the Perky patent in 1912, the plaintiff and its predecessors spent more than \$17,000,000 in advertising, and creating good-will in the name of "Shredded Wheat" and in its trademark.

They thus built up a large business and a very valuable good-will. Between 1896 and 1932 they sold

in the United States 45,353,320 cases, containing 19,592,634,240 biscuits. In 1932, the product was found upon the breakfast tables of more than 25,000,000 families. It is undisputed that at the time defendant adopted the name "Shredded Wheat", and the trademark of the plaintiff to designate its product, the trade and consumers generally had come to regard the name and trademark as identifying the plaintiff's biscuit.

If the name "Shredded Wheat" were purely descriptive of plaintiff's product it could not have been the subject of a patent for "whatever is mere description is open to all the world". *Cheavin v. Walker*, 5 Ch. Div. 850; *Singer v. June*, 163 U. S. 169, 194. Defendant contends that the name is descriptive, and may be used by it, but we do not think it is. The evidence shows that in reducing the grains of wheat to the product called "Shredded Wheat" there is no cutting or tearing into small pieces or shreds. As above stated, after the wheat has been cleaned, cooked, cured and partially dried, it is passed between two rollers of highly tempered steel in contact at high pressure, one roller having a flat surface and the other having grooves in its circumference varying in depth from .017 to .024 inches. The grains of wheat are thus forced into the grooves, mashed and the component parts thoroughly macerated. They come from the rolls in the form of long filaments or threads. These threads of wheat come out or extrude from the rollers just as steel rails do when steel is passed between rollers, and just as copper wire does when copper is passed between rollers. But it has never been suggested that in making steel rails or copper wire the steel or wire was "shredded". Neither can it be said that the wheat is "Shredded", in the plaintiff's process. It is mashed and mangled. The name at most is merely suggestive, and words suggestive of the qualities or characteristics of an article may be used as valid trademarks. Penn-

sylvania Salt Co. v. Myers, 79 Fed. 87; Globe-Wernicke Co. v. Brown, et al., 121 Fed. 185; Trinidad Asphalt Manufacturing Co. v. Standard Paint Co., 163 Fed. 977; Van Camp Sea Food Co. v. Stewart Organizations, 50 Fed. (2d) 976. The true descriptive name for this product is "whole wheat biscuit". This has been recognized by the appellant's competitor; and many others. Twenty-seven states, including Delaware, and many foreign countries have accepted and registered the word "Shredded Wheat" as a legitimate trademark which could not properly be done if the name were simply descriptive.

But assuming, merely for the sake of argument, that the word "shredded" was originally a descriptive term and used to describe the action upon the wheat, it would manifestly be unfair after all these years and the expenditure of vast sums of money, when the name has acquired a secondary meaning, and has come to stand for the product itself, to allow the defendant to use it as it has done and thus acquire the trade which rightfully belongs to plaintiff.

In 1912, when the Perky patent expired, the defendant or any competitor might have used the name and form of the biscuit under proper restrictions, to designate his product, but the fact is that nobody did it, and nobody attempted to do it, with the exception of the defendant and the Ross Company, as above stated. During all this time the defendant and all other competitors sat by and allowed the plaintiff at great expense to make "Shredded Wheat" a household word and the form of its biscuit known throughout the world as its own product. Some competitors sold their product which in a sense is similar to the plaintiff's under descriptive names. For instance, the defendant called its product "Kellogg's Whole Wheat Biscuit". This is exactly what it is. It is a biscuit made from whole wheat by Kellogg. But this did not enable the

defendant to get the property which the plaintiff had built up in the name of "Shredded Wheat" and so it abandoned its effort to sell its product as "Kellogg's Whole Wheat Biscuit". The Quaker Oats Company manufactured a biscuit in accordance with the process of the Perky patent and called it "Muffets". The Ross Company called its biscuit "Whole Wheat Biscuit" and the Loose Wiles Biscuit Company called its biscuit, "Rippled Wheat".

The case now stands in equity just as it would have stood if there had been no patent before 1912 and the plaintiff's competitors had sat by and allowed it from that time on to build up at great expense a valuable good-will in the name. If defendant had desired to use the name at the expiration of the patent, it should have seasonably done so, but it did not. It rather slept away its rights for fifteen years and now comes in, adopts the name and trademark and tries to appropriate the fruit of the plaintiff's labor and money. The adoption by any one of the name and form of an article under which a competitor has been selling it, carries with it the presumption that he expects to derive benefit from this adoption and intends to mislead the public with probability of success. *Shredded Wheat Company v. Humphrey Cornell Co.*, 244 Fed. 519, affirmed in 250 Fed. 960.

When a person, after the expiration of a patent, has spent such enormous amounts of money during a period of fifteen years to create a valuable property right in the name and form of his product, equity today will not permit another to apply the name and form of the merchandise to his product and thus appropriate it to his own use and advantage and to the injury of the one who has created the good-will. Upon the expiration of the patent, the property right in the name passed to the public, but if the public wished to retain

this right in its domain, it had to avail itself of the right within a reasonable time. 18 Corpus Juris 72.

This is a case of unfair competition and not of the infringement of a patent. When a name, admittedly descriptive, has acquired a secondary meaning and has come to stand for the article itself, equity will not permit a competitor to use the term as a trade name, as defendant in this case has done. In the case of *Barton v. Rex-Oil Co.*, 29 Fed. (2d) 474, the word "Dyanshine" was involved. This was a purely descriptive term and in the beginning was open to the world, but it had been used long enough to acquire a secondary meaning and was a trade name for the shoe polish itself which dyed and shined shoes at the same time. In that case we said:

"At the rehearing the appellants contended, and have succeeded in convincing us, that as a matter of fact the only way to prevent such confusion and deception in this case is to enjoin the appellee from using these words as the name of its product and from using them so positioned, spelled and printed on its cartons and advertising matter as to resemble a name for its product. Moreover, the complainants have satisfied us that on a definite and unequivocal finding of fact of this kind the law affords the remedy of injunction against the use of words which in instances such as this have acquired only a secondary meaning when those words are used as the name of a product as distinguished from their use in describing it."

We held that the defendant was guilty of unfair competition and enjoined it "from using the words 'dye and shine' in any way, form, arrangement, or manner of spelling as the name, or as resembling a name, of its product, leaving it free, of course, to use these words merely and exclusively in describing the qualities and characteristics of the product." This the defendant in the case at bar is free to do, but may

not, as it has been doing, use the words "Shredded Wheat" as the trade name of its product.

In the case of *Nu-Enamel Corp. v. Armstrong Paint & Varnish Works*, 81 Fed. (2d) 1, Judge Evans speaking for the Circuit Court of Appeals for the Seventh Circuit said:

"Some there are whose conception of business integrity and fair play is rather hazy, and generally ruled by self-interest, who attempt to justify efforts to acquire the business which another has developed through many years of fair dealing and through the expenditures of vast sums in advertising and in establishing a good will. This illegitimate activity has increased because in the past few decades the practice has grown among established enterprises of giving a name, or a particular form of container, or form of product, or other mark of identification to a product it makes or sells so that the public may know its product. Good will has followed familiarity with and use of the commodity. In some instances, the product has been patented. After the patent has expired, the same strenuous efforts are made to familiarize the users with the name or a word, which in its beginning may have been descriptive, but which because of form of container, combination of letters, etc., has identified it as the product of a certain individual or company. By so doing a property right is developed which should be respected."

In *Scandinavia Belting Co. v. Asbestos & Rubber Works*, 257 Fed. 937 (C. C. A. 2) it was contended that the trademark, "Scandinavia" in addition to being invalid because it was geographical, had passed into the public domain and had become public property upon the expiration of the patent covering the product to which the trademark had been applied during the life of the patent. In disposing of that contention the court said:

"But there is another and conclusive reason why this claim that the name 'Scandinavia' became open to the public on the expiration of the patent is of no avail to the defendant, for if it were to be conceded that the doctrine of the Singer Case originally applied the evidence shows that the public did not avail itself of the right, and that now because of the registration of the trademark under the 10 years' clause it is not at liberty to violate the plaintiff's exclusive right."

In the case of *McKesson & Robbins v. Phillips Chemical Co.*, 23 Fed. (2d) 763, the validity of the registration of the trademark "Milk of Magnesia" was involved. The product manufactured by the owner of the mark was patented but the patent had expired. The owner of the mark had exclusive use of the trademark for ten years preceding the Trade-Mark Act of 1905. The Court of Appeals of the District of Columbia in discussing the effect of the expiration of the patent and the doctrine of *Singer v. June* as applied to the facts of that case said:

"Where the public fail to avail itself of the right to manufacture the patented article and use the name by which it was designated, and 10 years' exclusive use of the mark intervenes prior to the Trade-Mark Act of 1905, the party using the mark is entitled to registration under the 10-year clause of the Act."

Section 5 of the Trade-Mark Act of 1905 (U. S. C. A. Title 15, Section 55) provides that when the applicant for the registration of a trademark or his predecessor has had actual and exclusive use of the mark as a trademark for ten years prior to the passage of the Act, nothing in the Act should prevent its registration. This provision of the Act was in effect declaratory of the equitable doctrine that the exclusive use of a trademark by a person for ten years

after the expiration of the patent entitles him to the exclusive use of it thereafter.

The defendant appropriated not only the name of the plaintiff's product, but also its form and shape which has characterized the biscuit for more than forty years. The expiration of the design patent did not confer any rights upon the defendant for the reason that the patent was held by Judge Kohlsaat to be invalid before its expiration on the ground that the design had been in use for more than two years prior to filing the application for the patent and for the further reason that if it had not been declared invalid for that reason, the plaintiff and its predecessors used the particular form, appropriated by defendant, for its biscuit for forty years and equity will not permit the defendant to use the name and trademark to designate its product. The case stands as it would have stood if there had been no patent and the plaintiff had started with a new and unpatented product, in 1912 calling it by the trade name of "Shredded Wheat" which it had sold in a particular form and for fifteen years had spent \$17,000,000 in advertising it and had built up an invaluable good-will in the name which it had exclusively used.

In order to secure the property of the plaintiff in the name and form of its product, the defendant placed upon its cartons the words, "The original has this signature: W. K. Kellogg". That is, defendant not only adopted the name and form of plaintiff's product, but also claimed that its product was the *original* and by implication that the plaintiff's was an *imitation*. There could have been but one object for doing this, and that was by unfair competition and untruthful statements, to deceive the public and secure the trade which in equity and good conscience belonged to the plaintiff. This equity will prevent by injunction.

In view of the fact, that "Shredded Wheat" is the plaintiff's trade name, that defendant deliberately started out to acquire by unfair competition and misstatements the trade which equitably belonged to the plaintiff and that it is practically impossible for the defendant to use the name and form of plaintiff's biscuit to designate its product without confusion, deception of the public and unfair competition with the plaintiff, a decree will be entered vacating our former decree and reversing the decree of the District Court with directions to the court to enter a decree enjoining the defendant from the use of the name "Shredded Wheat" as its trade name and from advertising or offering for sale its product in the form and shape of plaintiff's biscuit in violation of its trademark; and with further directions to order an accounting for damages and profits.

A true Copy:

Teste:

*Clerk of the United States Circuit Court of Appeals
for the Third Circuit.*

ORDER REVERSING DECREE, ETC.

(Filed April 12, 1937.)

IN THE UNITED STATES CIRCUIT COURT OF APPEALS,
FOR THE THIRD CIRCUIT.

No. 5801. October Term, 1935.

National Biscuit Company,
Plaintiff-Appellant,

v.

Kellogg Company,
Defendant-Appellee.

APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE DISTRICT OF DELAWARE.

This cause came on to be heard on the transcript of record from the District Court of the United States, for the District of Delaware, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged, and decreed by this Court that the decree of the said District Court in this cause be, and the same is hereby reversed, with costs, with direction to the said District Court to enter a decree enjoining the defendant from the use of the name "Shredded Wheat" as its trade name and from advertising or offering for sale its product in the form and shape of plaintiff's biscuit in violation of its trade-mark; with further directions to the said District Court to order an accounting for damages and profits. The decree of this Court of January 16, 1936, is vacated and set aside.

Philadelphia, April 12, 1937.

J. WARREN DAVIS,
Circuit Judge.

APPELLEE'S PETITION FOR REHEARING.

(Filed May 7, 1937.)

IN THE UNITED STATES CIRCUIT COURT OF APPEALS,
FOR THE THIRD CIRCUIT.

No. 5801. October Term, 1936.

NATIONAL BISCUIT COMPANY,
Plaintiff-Appellant,
against

KELLOGG COMPANY,
Defendant-Appellee.

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APPELLEE'S PETITION FOR REHEARING.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS,
FOR THE THIRD CIRCUIT.

No. 5801. October Term, 1936.

National Biscuit Company,
Plaintiff-Appellant,

against

Kellogg Company,
Defendant-Appellee.

This is a petition for a second rehearing. For the reasons which appear in the petition counsel believe that such a rehearing should be granted.

Counsel are not unaware, however, of the difficulty which confronts them in attempting to persuade this Court to reconsider a case in which it has handed down two diametrically divergent opinions. Yet this case, if for no other reason than that two such opinions have been written, *does* require reconsideration.

Counsel for the appellee-defendant have never had an opportunity to present an argument upon the questions covered by the Court in its second opinion. Plaintiff had specifically conceded that an injunction as broad as that now ordered could not issue. Defendant had accepted that concession as binding upon plaintiff and the Court and did not argue the point.

[2] We do not believe that the Court's treatment of some of the questions will stand analysis. We are confident that this position is capable of demonstration.

Accordingly counsel respectfully suggest to the Court that if it cannot see its way clear to grant a

rehearing (which counsel very much hope that it can) then, in the alternative, the Court certify the questions involved to the Supreme Court of the United States.

Such action would be peculiarly warranted in a case in which the Court has definitely reversed itself, not to mention the conflict between the last decision of this Court and the decision of the Circuit Court of Appeals for the Second Circuit upon the same set of facts.

The Circuit Court of Appeals for the Second Circuit has held (*Kellogg Co. v. National Biscuit Co.*, 71 Fed. (2) 662) that on those same facts this defendant has a cause of action against this plaintiff. The first decision of this Court was not inconsistent with this conclusion but the second one is.

This Court by its second decision in this case has held on the same facts that the plaintiff has a cause of action against this defendant.

The last decision of this court holding that the words shredded wheat are not descriptive of the goods, were not so used by plaintiff and are capable of exclusive appropriation by plaintiff is in conflict with the decision of the Court of Appeals of the District of Columbia (*Natural Food Company v. Williams*, 30 App. D. C. 348) in which a contrary conclusion was reached on substantially the same issues and in which plaintiff acquiesced.

The last decision of this Court, holding that plaintiff may lawfully appropriate exclusively the form (and thus the right to manufacture) the biscuit in issue is also in direct conflict with the decision of the Circuit Court of Appeals for the Second Circuit in *Shredded Wheat Co. v. Humphrey Cornell*, 250 Fed. 960, in which an opposite conclusion was reached.

[3] On the same state of facts, the same issues as are involved herein were decided between subsidiaries of

the same parties by the five judges of the Court of Appeals of Ontario who cited and followed the decision of the District Court in this case in unanimously affirming the judgment of Mr. Justice McTague, dismissing the complaint (*Canadian Shredded Wheat Company Limited v. Kellogg Company of Canada, Limited*, decided November 30, 1936, copy filed herein).

The Canadian law as applied in this case is the same as the American, English and French law. So that, defendant's business south of the Canadian line is now held to be outlawed whereas north of the line it is held to be lawful. This is a serious and important conflict in every way.

The last decision of this Court is also, we believe, in conflict with the decisions of the Supreme Court of the United States in *Singer v. June*, 163 U. S. 169, regarding the effect of patent expirations upon the form and name of a patented article and of decisions of the same court in *Beckwith v. Commissioner of Patents*, 252 U. S. 538, and *Rahtjen v. Hoizapfel*, 183 U. S. 1, holding that disclaimers embodied in trademark certificates are irrevocable. This court's decision is contrary to *Delaware & Hudson Canal Co. v. Clark*, 13 Wall. 311, *Standard Paint Co. v. Trinidad Asphalt Manufacturing Co.*, 220 U. S. 446, and *Warner v. Eli Lilly*, 265 U. S. 526, which decide that the invariable rule is that relief in trademark infringement and unfair competition cases alike rests upon the wrongs of the defendant in passing off its goods as plaintiff's and not upon any alleged right of a plaintiff to be protected in a name or form which under the guise of a trademark will set up monopolies in products which all are free fairly to make and sell. The decision is also in conflict with that of the Supreme Court in *Warner v. Eli Lilly*, 265 U. S. 526, and other cases holding that a Court has power only to restrain the use of ornate

mental, fanciful or non-essential features of dress or appearance and not the use of functional forms or essential features and thus to stop the defendant from all competition whether fair or not.

The last decision of the Court is also in substantial conflict with its own view of the law as applied in *Amiesite v. Interstate Amiesite Co.*, 72 F. (2d) 946, and also with the decision of the Circuit Court of Appeals for the Second Circuit in *Du Pont Cellophane v. Waxed Products*, 85 Fed. (2) 75 Cert. den. 57 Sup. Ct. 194.

Finally, the decision is novel beyond all precedent in holding in effect that as to goods which reach the final consumer in cartons, the purchaser can be confused about the contents which he cannot see. Even the plaintiff admits the obvious fact that the cartons which cover the contents at the point of purchase are incapable of being confused or substituted one for the other.

On these matters of grave and important conflict it is respectfully submitted that the Court should grant the defendant the right of full oral argument which on both hearings the court specifically requested defendant to forego, and that, should this for any reason be denied, the Court in fairness and justice not only to defendant but to other litigants affected by the conflicts of decision as pointed out, should certify the questions involved to the Supreme Court of the United States for its determination. However, it is confidently believed that a full rehearing should be granted upon the following grounds:

FIRST: That at none of the hearings has the defendant been permitted fully to present its case by oral argument.

SECOND: That the injunction as ordered is barred by specific statutory and other disclaimers of plaintiff and by final judgments binding on plaintiff.

THIRD: That this Court lacks constitutional power to create and enforce the two perpetual monopolies conferred on plaintiff by the proposed injunction.

FOURTH: That the Court should not give exclusive trademark rights in the word shredded.

[5] FIFTH: That the ten year proviso of the Federal Trade Mark Statute does not apply.

SIXTH: That the words shredded wheat have no secondary meaning and that even if they did defendant has a right to use them in a non-deceptive way.

SEVENTH: That the defendant has not misrepresented its goods nor has its use of the name shredded wheat deceived or misled anyone or produced confusion.

To consider these contentions in order.

I.

In none of the hearings has the defendant been permitted to present its case by oral argument.

Plaintiff has now had two complete oral hearings by different counsel and the Court on the second hearing reversed its per curium opinion given after the first hearing.

Defendant has never had a chance to make a complete oral argument. On the first hearing defendant's counsel were stopped before any argument had really started. On the second hearing the Court asked defendant's counsel to direct their arguments to the question of descriptiveness of the words shredded wheat. And this was done.

Defendant's case obviously was not considered even on the briefs presented, as shown by the fact that no reference is made to plaintiff's concession of defendant's right to make the biscuit. Defendant accepted the concession and assumed the Court would act on it. Also the important fact of the specific statutory disclaimers pointed out in defendant's briefs as an absolute bar to the injunction decreed.

The Court by its proposed mandate has ordered the District Court to create in plaintiff three exclusive and perpetual monopolies, irrespective of any wrongs of defendant.

- [6] 1. In any kind of food product, whatever its form and whether truly shredded or not, if defendant should sell it under the name shredded wheat.
2. In a pillow shaped biscuit irrespective of the name applied to it.
3. In a dish shown upon a food package.

We reiterate that the proposed perpetual monopolies are to be based on alleged rights of the plaintiff irrespective of wrongs of the defendants. For example, defendant on this record is guiltless of any fraud or deceit. Its packages are incapable of being passed off as plaintiff's and its biscuit are clearly distinguishable by size from plaintiff's. Yet defendant is to be enjoined from all competition fair or unfair. Even though defendant might attach to each biscuit a crimson placard as large as a ship's anchor stating its manufacture, it would still be perpetually enjoined. Even though it was proved by defendant and not disputed by plaintiff that hundreds of food manufacturers display dishes on their packages, even though a dish is the most commonly used advertising device in the package food business, even though a dish could not possibly indicate origin of manufacture in any one

manufacturer or enable another, by its use, to pass off its product as plaintiff's, yet—defendant is to be restrained from placing a dish on its package.

The proposed three perpetual monopolies which the District Court is ordered to confer upon the plaintiff are far wider and broader than any patent protection plaintiff had during the life of its machine, product, process and design patents on shredded wheat.

For example dozens of patents were granted on wheat shredding machines during Perky's patent monopoly, and it was proved and held in *Williams v. Natural Food Company*, 30 App. D. C. 348, that Williams used such machines to make and sell shredded wheat under that name during the first ten years of plaintiff's monopoly without infringement of plaintiff's patents, yet Williams [7] could not use his shredding machines to make shredded wheat biscuit or call his product shredded wheat or place a dish on his package without now infringing the perpetual monopolies which the District Court has been ordered to create.

Defendant has worked out patented machines for making shredded wheat which would not infringe the Perky patents if they were still alive, but the operation of those machines would infringe the patent, name and dish monopolies which the District Court is ordered to create by perpetual injunction.

In decreeing these three perpetual monopolies of form (and therefore of machines and processes for producing) of name and of display dish, the Court has disregarded:

1. The Constitution which authorizes such monopolies only for limited times and when based on inventions or creations of authorship.
2. The long established and heretofore unquestioned principles of perpetual dedication of name and

form by expiration of patent and of perpetual dedication by specific statutory disclaimer of both name and form, and of specific disclaimer renewed upon the rehearing herein.

3. The heretofore universal and unquestioned rules

- a. That the limit of the Court's power is to restrain defendant from passing off its goods or wares as plaintiff's, not to enjoin defendant from competition not resulting in deception or confusion of goods.
- b. That the Court may enjoin only matters of dress and appearance which can be altered without destroying defendant's indubitable and paramount right to compete.
- c. That if confusion arises solely from defendant's indisputable right to compete, plaintiff must suffer it as the Courts have no power to set up perpetual rights in functional features, processes, machines or designs.

[8] Defendant therefore respectfully questions and denies the power or the constitutional and statutory authority of the Court to order the District Court to set up the monopolies of form, machine, process, name and display as ordered by this Court, and in view of the fact that the Court on both hearings requested defendant to shorten, limit and omit oral argument and that defendant was misled by a specific disclaimer made by plaintiff, accepted by defendant and thought to have been accepted and binding on the Court, defendant hereby applies for an opportunity to be heard on the issues raised by the proposed mandate.

II.

The injunction ordered is barred by specific statutory and other disclaimers of plaintiff and by final judgments binding on plaintiff.

A disclaimer is final and cannot thereafter be revoked. In *Beckwith v. Commissioner*, 252 U. S. 538, 545, the Supreme Court said:

"... the registrant would be precluded by his disclaimer from setting up in the future any exclusive right to the disclaimed part of it."

In *Rahtjen v. Holzapfel*, 183 U. S. 1, the same rule was laid down.

The trademark and disclaimer record of plaintiff is as follows:

1. *Goddess Ceres*, No. 52858 (R. V. 5, p. 193) filed June 3, 1905, issued May 22, 1906, covering picture of "Goddess Ceres", for use on "biscuit or crackers", used "since January 1, 1894." Use of "Goddess Ceres" trademark was dropped in 1915. So that plaintiff's registered trademark until 1915 was the Goddess Ceres.

2. The rejected "Shredded Whole Wheat" application. This was filed in June 1905 under the ten year clause [9] of the 1905 Trademark Act. Filing under this clause was an actual admission of descriptiveness. The drawing showed the word "shredded" to which the words "whole wheat" were subsequently added. This ten year clause application was opposed by William E. Williams on the ground of concurrent use. The two tribunals of the Patent Office sustained the opposition and were affirmed by the Court of Appeals of the District of Columbia in a decision reading in part as follows (*Natural Food Co. v. Williams*, 30 App. D. C. 348):

"It appears that . . . Williams . . . early in 1894 built a machine the function of which was to convert the whole grains of wheat into shreds . . . in 1902 he was enabled to build an improved machine and has since constructed others . . . and from that time Williams has continued without interruption to manufacture and sell shredded whole wheat . . . *He also offered in evidence several patents some of which were granted in 1894 which disclose machines for converting cereals, including whole wheat into shreds . . .*

"The appellant for ten years prior to 1905 had not exclusively used the word which it sought to have registered . . . it is open to question whether appellant in fact used these words as a trademark until after the enactment of the ten year clause in 1905. . . . The Natural Food Company claimed the figure (of Goddess Ceres) as its trademark and *not* the words 'Shredded Whole Wheat' which were apparently then used to merely describe the contents of the package." (Italics ours.)

This decision was rendered February 4, 1908.

So that in 1908 plaintiff was specifically and finally refused the ten-year clause monopoly which this Court by pure judicial legislation is attempting perpetually to bestow on it in 1937.

3. Judge Nields found as follows:

"On September 17, 1895 Perky took out a design patent No. 24,688 upon a biscuit shown in accompanying drawings. One drawing showed a biscuit in plan view. The other drawing showed an end view. This patent would expire by limitation September 17, 1909. In 1908 Judge Kohlsaat declared this design patent invalid upon proof that Perky in his application swore falsely that the design had not been in public use more than two years. *Natural Food Company v. Henry P. Bulkley, et al. No. 28,530 N. Dist. Ill., East Div.* Instead of removing notice of the Perky design patent from the carton or otherwise notifying the public

it was no longer claiming protection under the patent, plaintiff continued for seven years thereafter to warn the public not to make the biscuit as it was under the protection of the government by virtue of this design patent. By its professions and conduct plaintiff secured a monopoly not for fourteen years but actually for twenty years."

Plaintiff accepted, and acted on the final judgment in the *Williams* case by specific disclaimer of name and form as follows:

4. **The Dish and one-biscuit registration with "Shredded Wheat" biscuit disclaimed.** (R. V. 4 p. 197). This was filed May 11, 1911 under the 1905 Trademark Act. It illustrates one shredded wheat biscuit in a dish with a spoon and cream. The registration, No. 85186, issued June 30, 1912, states that plaintiff: "has adopted for its use the trademark shown in the accompanying drawing, no claim being made to the representation of a shredded wheat biscuit, for cereal biscuit in Class 46 Foods and Ingredients of Foods", use claimed since September 15, 1909. This one-biscuit dish is no longer used on plaintiff's packages.

5. **The Factory-picture trademark for "shredded wheat" in Class No. 44, Foods.** Filed December 7, 1911 under 1905 Act. The certificate states that plaintiff: "has adopted and used the trademark shown in the accompanying drawing (factory picture) for shredded wheat, in Class 46, Foods . . . the trademark has been . . . used . . . since March 1, 1910 . . . No claim is made herein to the words 'The home of Shredded Wheat'".

[11] Here was specific adoption of the finding of the District of Columbia Court of Appeals that "shredded wheat" was the description of the product and irrevocable disclaimer of (a) the picture of the biscuit and

(b) the words "the home of Shredded Wheat" as trademarks.

6. Ross' indubitable right to make. The Ross biscuit was indistinguishable from plaintiff's and was put out in 1914 or 15 and continued for several years until Ross' operations were terminated by bankruptcy. Ross' right to make was upheld by all four judges in the case (*Humphrey Cornell v. Shredded Wheat Co.*, 250 Fed. 960).

Judge Thomas on the trial held that Ross should be restrained (D. Ex. 126 V. 4 p. 165).

"unless there is clearly and unmistakably marked on each biscuit words stating that such biscuit is made by the defendant."

In the Court of Appeals Judge Ward dissented, holding that the bill should be dismissed, and Judges Learned Hand and Hough, held that Judge Thomas' injunction which permitted Ross to make but required all biscuits in and out of cartons to be marked, was too broad. The Court of Appeals vacated the injunction as to all biscuits reaching the final consumer in cartons and as to biscuits served apart from cartons held that Ross should endeavor to mark, and if he could not do so without destruction of his "indubitable right" to make the injunction applying to the restaurant trade also would be dissolved, which would have left no injunction outstanding. The Ross Company went bankrupt before it could apply to the Court to vacate the restaurant injunction.

But this case left Ross' right to compete, intact, inviolate and unquestioned by either trial or appellate court. That was in 1918. In short, in 1908, the Court of Appeals in Washington held that Williams had concurrent user with plaintiff and that plaintiff could have no exclusive rights in the term "shredded wheat" and plaintiff em- [12] bodied this ruling in its formal stat-

utory disclaimer of both the form of the biscuit and the words "The Home of Shredded Wheat" and clinched the whole thing by describing the product on which its factory trademark was used as "shredded wheat".

Then the Court of Appeals in New York in 1918 fully sustained the indubitable right of Ross to make plaintiff's exact biscuit in 1918. This was in line with plaintiff's specific disclaimer of "the representation of a shredded wheat biscuit" and the words "the home of Shredded Wheat" as its trademark.

So that in 1908 and 1918 plaintiff was held to be barred from any exclusive rights in name or form by two final court judgments and these judicial bars were buttressed by irrevocable disclaimers and by patent expirations as to machinery, process, product and design.

7. Defendant entered the field in the winter of 1921-2 and remained in the field for a year. No suit was brought by plaintiff.

8. Plaintiff's 1924 disclaimer by registration. Plaintiff on November 14, 1923 filed application (R. V. 4, p. 201) to register "shredded wheat" in accordance with the Act of March 19, 1920. This application under the 1920 Act was an admission that the words were descriptive. The Act was put through to permit registration of descriptive words. Use was claimed since January 1, 1894. This is a statutory admission that there was no prior or independent use of shredded wheat before Perky applied for his patents in 1893.

9. Plaintiff's 1926 admission that "shredded wheat" is a descriptive term. (R. V. 4, p. 203). Plaintiff again registered "shredded wheat" under the descriptive term act of 1920.

10. Plaintiff's renewed disclaimer in 1926 of the form of the biscuit. (R. V. 4, p. 205). Plaintiff filed

application under the 1905 Trademark Act for a dish. Shewn [13] in the dish are two shredded wheat biscuit. The illustration is clear and indisputable, following that of the 1912 registration above. The shreds are shown and the ends of the biscuit. The registration contains this irrevocable disclaimer of the two shredded wheat biscuit shown in the drawing: "Applicant disclaims any exclusive right to the representation of two biscuits".

Here are the several irrevocable and specific statutory disclaimers of record in this case:

1. January 30, 1912, (R. V. 4 p. 197) "no claim being made to the representation of a shredded wheat biscuit" as shown in the drawing, the words being used in a purely descriptive sense as meaning the biscuit shown in the drawing.
2. November 5, 1912. Applicant has adopted the factory picture as shown as a trademark for "shredded wheat in class 46, Foods and Ingredients of Foods . . . no claim is made herein to the words 'The Home of Shredded Wheat'".
3. January 15, 1924. Descriptiveness of words formally conceded by registration of shredded wheat under 1920 Act (R. V. 4 p. 201).
4. May 25, 1926. Descriptiveness of words formally conceded by registration of shredded wheat under 1920 Act (R. V. 4 p. 203).
5. August 17, 1926. Plaintiff illustrates two shredded wheat biscuit in drawing and disclaims them as a trademark (R. V. 4 p. 205).

Defendant re-entered the field in 1927 one year after plaintiff's renewed disclaimer of the shredded wheat biscuits shown in the drawing, as its trademark.

The Court incorrectly states that the defendant abandoned the use of the words shredded wheat. This was not done although for a time defendant marketed a portion of its product in the other package referred

to. During that time it continued to sell shredded wheat to the complete knowledge of the plaintiff.

We confidently submit that these irrevocable statutory disclaimers, and the final decisions of two courts of appeal, [14] constitute an absolute bar to the injunction ordered by this Court and that rehearing must be granted if the Court is to be controlled by law.

The foregoing disclaimers are thought to be conclusive upon the matter of rehearing but they do not end the record.

10. Plaintiff's disclaimer of November 1935. In this Court at the first argument in November 1935, Judge Haight as counsel for plaintiff, explicitly conceded defendant's right to make the biscuit in issue, in response to questions asked by Judge Buffington.

11. Judge Haight's disclaimer was specifically made of written record in this cause by the filing of plaintiff's brief on rehearing which specifically concedes defendant's right to make at page 34.

"We confidently submit that the decree should be reversed and the case remanded with instructions to enter a decree for the plaintiff:

2. That the defendant be enjoined from manufacturing or selling or offering for sale Whole Wheat Biscuit in substantially the form and shape of plaintiff's biscuit, *unless each biscuit be branded or marked in such a distinctive manner as to state clearly that it is a product of the defendant and not of the plaintiff.*" (Italics ours.)

Defendant relied on the above disclaimer (Defendant's Brief on Rehearing, p. 5) and that closed the matter and put it beyond the power of the Court to disregard or set aside without hearing defendant upon the issue.

In the face of the above record, nowhere touched on in the Court's opinion, it is not seen how rehearing in law or justice can be denied.

[15] **III.**

This Court lacks constitutional power to create and enforce the two perpetual monopolies conferred on the plaintiff by the proposed injunction.

This Court proposes to prohibit defendant from making a biscuit in pillow shaped form. Prohibition to make the form is prohibition to make the thing. Plaintiff therefore is given a perpetual monopoly to manufacture an unpatented article of commerce. No court is empowered to create such a monopoly.

The proposed injunction in effect reinstates and makes perpetual the design patent invalidated on account of Perky's false oath by Judge Kohlsaat in 1908 and long since expired by limitation, as well as the long-expired machine and process patents, which plaintiff used during their life to exclude competitors.

Twenty or more judges have now ruled on the right of the public to make this form of biscuit: the District Judge and the judges of the Circuit Court of Appeals of the Second Circuit in the *Humphrey Cornell* case; the District Judge and this Court in this case; the District Judge and the judges of the Circuit Court of Appeals of the Second Circuit in *Kellogg Co. v. National Biscuit Co.*, 71 F. (2d) 662; the trial judge and the five Appellate Judges in the Canadian litigation; the three judges of the Court of Appeals of the District of Columbia in the *Williams* case, affirming two tribunals of the Patent Office.

Not one of these judges ever questioned the indubitable right of every one to make the ordinary, patent-expired article of commerce, shredded wheat, until this Court so decided on this reargument.

Considering the important constitutional question involved and the fact that defendant rested its case on the written concession of the plaintiff, defendant

should be heard before such an injunction is ordered. [16] No case is known to defendant's counsel in which any plaintiff has been permitted perpetually to monopolize the functional shape or appearance of a product. This Court once gave a plaintiff such a right and was reversed by the Supreme Court—*Warner v. Eli Lilly Co.*, 265 U. S. 526, reversing *Eli-Lilly Co. v. Warner*, 275 Fed. 752.

In that case, although actual fraud and deception on the part of the defendant were expressly found the Supreme Court said at pages 531-2:

"The petitioner or anyone else is at liberty, under the law, to manufacture and market an exactly similar preparation containing chocolate and to notify the public that this is being done . . . If petitioner had been content to manufacture the preparation and let it make its own way in the field of open and fair competition there would be nothing more to be said. It was not thus content, however, but availed itself of unfair means, either expressly or tacitly, to impose its preparation on the ultimate purchaser as and for the product of the respondent. Nevertheless, the right to which respondent is entitled is that of being protected against unfair competition not of having the aid of a decree to create or support, or assist in creating or supporting, a monopoly of the sale of a preparation which everyone, including petitioner, is free to make and vend. . . . The use disassociated from the fraud is entirely lawful, and it is against the fraud that the injunction lies. . . ."

The Court of Appeals held that Petitioner should be unconditionally enjoined from the use of chocolate. We think this case goes too far, . . ."

The Court then decreed merely that Defendant's containers should be fairly labelled. This the Kellogg Company has always voluntarily done.

This Court has held that because plaintiff, until its pretensions of monopoly were challenged by the

defendant, has succeeded in prolonging the life of its patents for ten years beyond the dates of their expiration, therefore, the dedication resulting from the expiration can be [17] recalled. In this respect, the Court differs from the Circuit Court of Appeals for the Eighth Circuit. In *Centaur v. Heinsfurter*, 84 Fed. 955, where an attempt was made, as here, to distinguish the Singer-June case on a like ground, Mr. Justice Brewster said (958):

“Counsel seek to distinguish this case in that there the controversy arose immediately after the expiration of the patent, while here the plaintiff continued in the exclusive manufacture of Castoria for some ten years thereafter, and hence it is insisted that, during the time when the right to manufacture and sell was common, it acquired a trade-mark in the name. But this matter of time makes no difference. But the word has become known as the name of the thing, and as such it could not be appropriated as a trade-mark.”

IV.

The Court should not have given plaintiff trade mark rights in the word shredded.

No one has ever asserted that the word wheat is anything but descriptive. The question is thus narrowed to the single word shredded. Is plaintiff's product shredded or not? Plaintiff has always said that it is. This Court now disagrees with the plaintiff and says that it is not.

Plaintiff never, at any time until the necessities of this case required it, considered the word shredded “suggestive” or otherwise than as completely and accurately descriptive of the goods it sells. This Court has ignored the plaintiff's admissions that shredded wheat is descriptive of its goods when in its second opinion it is said:

"Defendant says that the name is descriptive . . . but we do not think it is . . . neither can it be said that the wheat is shredded in the plaintiff's process."

The District Judge properly found the fact that "throughout these (the plaintiff's) patents the word 'Shredded' is used repeatedly and always as descriptive of the product."

[18] The patents themselves amply support this finding. Examples are in the margin:

Perky Patent No. 520,496, May 29, 1894, for a machine for the manufacture of food-products from cereals,

"the resulting product * * * in the form of films, strings, or shreds are deposited * * *"

"these shreds, strings or films fall upon this roll * * *."

"which catches such shreds, strings or films * * *."

Perky Patent No. 521,810, June 26, 1894, for a machine for the manufacture of food products from cereals,

"in uniformly irregular shapes of shredded or filamentous form * * *."

Perky Patent No. 532,286, January 8, 1895,

"to receive the shredded or thread-like product * * *."

Perky Patent No. 532,480, January 15, 1895, for a roll-machine for reducing cereals for food,

"to the form of long threads or shreds * * *"

"which disposes said threads or shreds lengthwise * * *"

"discharged in thread or shred-like form * * *."

"these shreds or threads * * *"

"to receive the shreds or threads * * *."

"disposes these continuous shreds * * *."

"disposition of the shreds or threads * * *."

Perky Patent No. 532,481, January 15, 1895, for a perforated-roll machine for reducing cereals for food,

"for reducing grain to thread-like or shred-like form * * *"

"in the form of threads or shreds * * *."

Perky Patent No. 532,647, January 15, 1895, for a roll-machine for reducing cereals for food,

"for the reduction of grain to shredded or thread-like form * * *."

"the threads or shreds of the food product * * *"

"the grain or other material to be shredded * * *."

"the material to be shredded * * *."

"to receive the shredded or filamentous discharge * * *."

[20] Anyone has a right to describe an article made under a patent by the words used by the patentee and

Perky Patent No. 532,698, January 15, 1895, for a groove-roll machine for reducing cereals for food,

"for reducing grain or other articles for food to shredded or thread-like form * * *"
"discharged from these grooves in shred or thread-like form * * *"

Perky Patent No. 533,551, February 5, 1895, for a roll-machine for reducing cereals for food,

"to reduce the material to shred-like or filamentous form * * *"
"discharging the same in thread-like or shred form * * *"

Perky Patent No. 533,552, February 5, 1895, for a roll-machine for reducing cereals for food,

"for the reduction of grain to shredded or thread-like form * * *"
"the threads of material * * * in shredded or thread-like form * * *"

Perky Patent No. 533,553, February 5, 1895, for a roll-machine for reducing cereals for food,

"circumferentially grooved shredding roller * * *"
"to thread-like or shredded form, the threads or shreds being discharged therefrom * * *"

Perky Patent No. 533,554, February 5, 1895, for a roll-machine for preparation of cereals for food,

"in the shape of continuous fine threads or shreds * * *"
"discharged the threads or shreds of food * * *"

[19] Perky Patent No. 525,555, February 5, 1895,

"one of the shredders in section * * *"
"a series of reducers or shredders * * *"
"Each reducer or shredding device * * *"
"in the form of continuous threads or shreds * * *"
"the discharged threads or shreds * * *"
"adherence of the shredded or threaded product * * *"
"the threads or shreds of material * * *"

Perky Patent No. 548,086, October 15, 1895, for bread and method of preparing same,

"their rough and porous thread-like or shred-like form * * *"

Perky Patent No. 571,284, November 10, 1896, for machine for reducing and preparing cereals for food,

"to thread-like or shredded form * * *"
"a series of reducers or shredding-heads * * *"
"reduced by their grooved rollers to shred or thread-like form * * *"
"a layer of the shred-like product * * *"
"a series of reducing or shredding heads * * *"
"the series of reducing or shredding heads * * *"
"in a grain shredding or reducing machine * * *"
"a grain shredding or reducing machine * * *"
"in a grain reducing or shredding machine * * *"

Perky Patent No. 571,285, November 10, 1896, for machine for reducing cereals,

"a small quantity of the shredded or filamentous product * * *"

in addition to illustrate the article itself from the drawings.

Perky Patent No. 598,745, February 8, 1898, for roll reducing machine for preparing food,

"the prepared grain above referred to or shreds of the same ***"

"the discharge of the shreds or strips ***"

Perky Patent No. 614,338, November 15, 1898, for machine for reducing cereal food products to form for use,

"several sets or gangs of shredding devices ***"

"the number of shredding-heads in each set ***"

"these roll-shredders discharge the material in the form of threads or shreds ***"

"the threads or shreds are transferred ***"

"the shredding or reducing head ***"

"a comminuting or shredding effect ***"

Perky Patent No. 618,288, January 24, 1899, for apparatus for making folded wafers,

"the reducing or shredding rolls ***"

"the shreds or threads of the material ***"

"to shredded form, the shreds or threads being discharged ***"

"the threads or shreds are transferred ***"

Perky Patent No. 625,696, May 23, 1899, for a machine for reducing and baking cereals in form,

"continuous layers of shred or thread-like form ***"

"continuous threads or shreds ***"

Perky Patent No. 667,892, February 12, 1901, for apparatus for manufacturing cereals into forms of food or bread,

"to shred or thread-like form, each head depositing a layer of the shred-like threads ***"

Perky Patent No. 678,127, July 9, 1901, for machine for reducing food material to form and distributing same,

"reduced to shred or thread-like form ***"

[20] Perky Patent No. 678,625, July 16, 1901, for pneumatic panning or distributing machine,

"formed by shredding the grain ***"

Perky Patent No. 681,656, August 27, 1901, for continuous cutting-machine,

"machines for cutting shredded wheat ***"

Burbank Patent No. 684,789, October 22, 1901, for distributive depositing or panning machine,

"sections or cakes of shredded wheat ***"

Perky Patent No. 713,795, November 18, 1902, for filamentous cracker,

"a cracker of filamentous or shredded wheat or other grain ***"

Perky Patent No. 797,604, August 22, 1905, for machine for preparing food,

"the fibred, filamentous, or shredded form of the reduced grain ***"

"which shred the grain ***"

It was said in *Bristol C. v. Graham* (C. C. A. 8) 199 Fed. 412:

"The defendant or any one else having a right to make the facing, he had a right to describe it as it was described in the specification in the patent. In describing it he was not limited to the words used by the patentee in telling what the patent was. He was entitled to describe it by drawings. The registered trade-mark is nothing more than a pictorial description of the article made."

Plaintiff has always used shredded and shredded wheat descriptively in presenting its product to the public. Plaintiff's carton announced: "Shredded Wheat is made of the whole wheat and is made digestible by steam cooking, shredding and baking." In its advertisements, plaintiff speaks of "our shredding process"; "The whole wheat steam cooked, shredded and baked"; "just whole grains of wheat steam cooked, shredded and baked to a crisp golden brown." "It is the shredding process that puts the 'eat' in the whole wheat."

These are merely a few of literally thousands of instances. If the Court is interested in pursuing the [21] matter further we refer to pages 3 to 13 of defendant's "Memorandum after Rehearing," where all of these statements are quoted and record references given. Plaintiff has said for over forty years that its product is shredded and has used the words shredded wheat as a description. For this Court to say that the word shredded does not describe plaintiff's product, is not only to disregard the facts of language, but ignores the plaintiff's own assertions and the specific finding of fact by the Court below and in this Court's first opinion, as follows:—"Moreover, it is clear that the word shredded was a descriptive word, aptly describing the process to which certain grains were sub-

jected by anyone using shredded or mangling in processing wheat grains." See also the almost identical language and finding in *Natural Food Co. v. Williams*, supra.

V.

The ten-year proviso of the Federal Trade Mark Statute (U. S. C. Tit. 15, Par. 85) does not apply.

The *McKesson-Robbins* case cited on page 9 of the Court's opinion, was reviewed in a bill under Section 4915 of the revised statutes brought by the defeated party. The Circuit Court of Appeals for the Second Circuit (53 Fed. (2d) 342; 53 Fed. (2d) 1011) vacated the decree of the Court of Appeals of the District of Columbia and cancelled the registered marks involved.

If public policy requires a new ten-year period other than that next preceding the date of the passing of the 1905 Trade Mark Act, this should be for Congress to decide. No such public policy has ever been declared by Congress or by any court.

The Court, in referring to the Ten Year Clause of the Trade Mark Act of February 20, 1905, apparently overlooked the fact that the plaintiff attempted to secure protection under this provision of the law and failed [22] (*Natural Food Co. v. Williams*, 30 App. D. C. 348) where shredded wheat was held to be descriptive and not used by plaintiff as a trade mark. Plaintiff acquiesced in this ruling by applying for registration of the same mark under the Act of 1920 (U. S. C. Title 15, Sec. 121). This act, unlike the Act of 1905, (U. S. C. Title 15, Sec. 96) confers no presumption of validity (*Rouss v. Winchester Co.* (C. C. A. 2), 300 Fed. 706, 712; *Kellogg v. National Biscuit Co.* (C. C. A. 2), 71 Fed. (2d) 662, 666), so holding with respect to the identical marks involved here and between these parties.

, Moreover the plaintiff acquiesced in denial of registrations as above set forth, and others in which it expressly disclaimed all right either to the name or to the representation of the form.

The cases cited in the opinion of the Court on this point are all cases in which the ten-year proviso—which plaintiff unsuccessfully invoked—actually applied. In none of them had an unsuccessful attempt been made to qualify under it and in none had there been a disclaimer.

VI.

The words shredded wheat have no secondary meaning and even if they had defendant has a right to use them in a non-descriptive way.

In its present opinion, the Court says (p. 5) "when the name has acquired a secondary meaning and has come to stand for the product itself, to allow the defendant to use it as it has done and thus acquire the trade that rightfully belong to the plaintiff . . . ". The District Judge, who considered the evidence, found as a fact (Rec. 225) that there was no secondary meaning of the term shredded wheat. This Court now says that a name has acquired a secondary meaning when "it has come to stand for the product itself". This is not secondary meaning. A name [23] which stands for the product itself, identifies the product, not the maker. Secondary meaning is exactly the reverse. A name, to have a secondary meaning, must stand for the maker, not the product.

If the Court is right in holding that plaintiff has had such continuous occupation of the shredded wheat field that no competitor may now enter it, then the Court is necessarily wrong in holding that secondary meaning has arisen, as secondary meaning can be found only where there is competition. Secondary meaning

is distinguishing meaning. To be distinguishing there must be something to distinguish from.

The so-called doctrine of secondary meaning, and indeed the term itself, originated in England, whence our law on the subject was derived.

The "secondary meaning"-rule was first applied to a descriptive term in *Reddaway v. Banham* (1896) A. C. 199, 13 R. P. C. 218—the celebrated Camel Hair belting case—and within a few years, due to efforts to misapply it, was explained by the House of Lords in *The Cellular Clothing Company v. Maxton and Murray*, 16 R. P. C. 397. Lord Davey saying, (409, 10):

"The other observation which occurs to me is this, that where a man produces or invents, if you please, a new article, and attaches a descriptive name to it, a name which, as the article has not been produced before, has of course not been used in connection with the article, and secures for himself either the legal monopoly or a monopoly in fact of the sale of that article for a certain time, the evidence of persons who come forward and say that the name in question suggests to their minds and is associated by them with the Plaintiffs' goods alone, is of a very slender character, for this very simple reason because the Plaintiff was the only maker of the goods during the time that his monopoly lasted, and therefore there was nothing to compare with it, and anybody who wanted the goods had no shop to go to, and no merchant or manufacturer to resort to except the Plaintiff. Of [24] course, my Lords, that is a matter of express decision in the case of a Patent. If a man invents a new article and protects it by a Patent, then, during the term of the Patent, he has of course a legal monopoly, but when the Patent expires all the world may make the article, and if they may make the article they may say that they are making the article, and for that purpose use the name which the Patentee has attached to it during the time when he had the legal monopoly of the manufac-

ture. But, my Lords, the same thing in principle must apply where a man has not taken out a Patent, as in the present case, but has a virtual monopoly because other manufacturers, although they are entitled to do so have not in fact commenced to make the article. He brings the article before the world, he gives it a name descriptive of the article—all the world may make the article and all the world may tell the public what article it is they make, and for that purpose they may *prima facie* use the name by which the article is known in the market."

"My Lords, the second class of proof is that of witnesses, who say in effect this (I will take one of the best and I think one of the earliest witnesses—*Mr. Hanley*): 'If I heard anybody in the trade speak of "Cellular goods" I would understand that he meant the product of the Cellular Clothing Company'. Well, my Lords, so long as the Cellular Clothing Company were the only company who were making cellular goods that would not be astonishing, and so long as they retain the monopoly no doubt that might be the case; but, as I have already said in speaking of the proposition generally, it is in fact very slender evidence upon which to found the superstructure which the Pursuers' Counsel endeavoured to erect upon it, and indeed unless the gentlemen who give evidence of that kind know that there are other manufacturers making similar classes of goods there is nothing to compare it with, and they are merely stating a fact."

In this case the plaintiff, in its bill of complaint, in speaking of shredded wheat avers that "said product was [25] an entirely new product", (Rec. 12). Therefore, the plaintiff having invented or produced a new article and given the name shredded wheat to it, that name became the descriptive name of the article and

was incapable of exclusive appropriation. No one could make this product during the existence of the patents but when the patents expired and the product could be made by others the name and form of course could be used, the only obligation on the new comer being to use both in such a manner as to prevent deception as to the maker. This duty, according to the undisputed facts in this case, defendant has discharged.

In *Kellogg Toasted Corn Flake Co. v. Quaker Oats Co.*, 235 Fed. 657, the Circuit Court of Appeals for the Sixth Circuit held that the plaintiff in that case could have no exclusive rights against the fair use of the name corn flakes for breakfast food even though ample showing of secondary meaning existed.

This Court has previously held in *Barton v. Rex Oil*, 2 Fed. (2d) 402, 404 and in *Fawcett v. Popular Mechanics*, 80 Fed. (2d) 194, 199, that however clearly secondary meaning may be proved, the secondary meaning mark never becomes a trade mark implying the complete exclusion of use by others. This is the rule also in the Second Circuit. *Chas. Broadway Rouss, Inc. v. Winchester Co.*, 300 Fed. 706, 714; *Scandinavian Belting Co. v. Asbestos & Rubber Works*, 257 Fed. 937, 951. This court now apparently holds that such secondary meaning marks may become valid common law trade marks so as to be "good against the world"—to use Judge Woolley's phrase in the Dyan-shine case—where this Court then held this could never happen.

The Supreme Court holds that even in the case of a valid common law and registered trade mark there is no exclusive right "good against the world"—and that non-deceptive use is legally permissible. In *Prestonettes, Inc. v. Coty*, 264 U. S. 359, Mr. Justice Holmes speaking of the rights of a trade mark owner said (p 368):

[26] "It (a trade mark) does not confer a right to prohibit the use of the word or words. It is not a copyright . . . A trade-mark only gives the right to prohibit the use of it so far as to protect the owner's good will against the sale of another's product as his. . . . When the mark is used in a way that does not deceive the public we see no such sanctity in the word as to prevent its being used to tell the truth. It is not taboo."

VII.

Defendant has not misrepresented its goods. Its use of the name shredded wheat and the form of the biscuit has not deceived or misled anyone and has not produced confusion.

Defendant, in the Court's latest opinion, is held guilty of unfair competition even though there is no suggestion that anyone has been confused or that any purchaser has been deceived.

In the original opinion, filed January 16, 1936, the Court adopted the findings of fact made by Judge Nields, saying: "Now that no confusion, misleading or deceit is shown in this case, is clear", and, "In that regard we agree with the Court's summary". The opinion then quotes Judge Nields' finding of fact that there has been no confusion of goods or deception of the public.

The Court's second opinion refers to the transitory use on defendant's containers of the words "the original bears this signature", which was taken from defendant's well known Corn Flake package. No complaint as to this appears in the bill of complaint, no prayer for relief is directed to it and it has long since been discontinued. It was raised for the first time as an afterthought long after the trial and is in no way involved in this case.

The cartons which are in issue are reproduced in Judge Nields' opinion below. They do not carry this

[27] phrase which in advertising appeared on a negligible number of cartons and has long since been dropped. It was never a prominent feature and never caused any confusion. The plaintiff did not suffer from this phrase which was an accidental carry over from defendant's corn flake cartons.

It is therefore submitted that the Court must have overlooked the fact that there can be no unfair competition without some confusion or tendency to it. However long plaintiff or other manufacturers continue to make this product, some confusion or passing off or the probability of it, must be present to constitute unfair competition. In this case none appears and there can be none. It is therefore respectfully submitted that, regardless of the points raised in the opinion on rehearing, still the plaintiff is not entitled to an injunction of any sort.

The law is as stated by the Supreme Court in *Howe Scale Co. v. Wyckoff, Seamans v. Benedict*, 198 U. S. 118, at p. 140:

"The essence of the wrong in unfair competition consists in the sale of the goods of one manufacturer or vendor for those of another; and if the defendant so conducts its business as not to palm off its goods as those of complainant, the action fails."

As the Supreme Court held in *Standard Paint Co. v. Trinidad Asphalt Manufacturing Co.*, 220 U. S. 446 (which the Court cites in its present opinion):

"There is something more of precision given to it in *Delaware and Hudson Canal Co. against Clark*, 13 Wall 311, 323, 20 L. Ed. 581, 583, where it is said that the essence of the wrong for the violation of a trademark 'consists in the sale of the goods of one manufacturer or vendor as those of another; and that it is only when this false rep-

resentation is directly or indirectly made that the party who appeals to a Court of Equity can have relief'."

[28] The Court appears to have been misled by plaintiff's brief with respect to this case. It is cited in plaintiff's brief at page 67. The reference there to the opinion of Judge Sanborn does not state that his is a dissenting opinion or that the majority opinion to the contrary was unanimously affirmed by the Supreme Court, 220 U. S. 446.

CONCLUSION.

If the Court intended to stop unfair competition as the term is used in the cases, namely competition which has an element, deception or the likelihood of it, plaintiff's case here fails on the facts. There is an unequivocal finding that defendant's acts do not confuse or deceive. This being so they do not damage the plaintiff except as they interfere with the monopoly it has so long enjoyed. If, on the other hand, the Court intended to create a new kind of unfair competition—to enjoin as unfair, a kind of competition hitherto, as far as we are aware, regarded as legitimate, we do not wish the Court to do so under any misapprehension. If it is the purpose to limit the right of anyone to make the article of an expired patent in the only shape it has ever had and call it by the only name it has ever borne—concretely to make shredded wheat and call it that, without any deceiving factor—then this court goes farther than any court has ever gone before. It makes new, and we submit, unsound law, not only contrary to accepted principles but in violation of the express provisions of the Constitution of the United States that patents exist for "limited times" and not in perpetuity and that disclaimers, statutory, oral and in printed briefs, are irrevocable.

We regret that these points were not pressed upon the Court upon the argument or in the brief, but since they were not stressed by the Court or opposing parties, a rehearing would constitute defendant's first opportunity to present them orally.

[29] Reconsideration and reversal are requested, and if this cannot be granted, it is respectfully suggested that the issues herein be certified to the Supreme Court of the United States.

Respectfully submitted,

CRICHTON CLARKE,

EDWARD S. ROGERS,

A. B. SEIBOLD,

ROBERT T. McCACKEN,

Counsel for Defendant-Appellee.

I, CRICHTON CLARKE, one of the Counsel for Appellee, hereby certify that I believe the foregoing petition for rehearing to be well founded in law and in fact and that it is not interposed for the purpose of delay.

CRICHTON CLARKE,

of Counsel for Appellee.

**NOTICE OF MOTION FOR RESTRAINING
ORDER, ETC.**

(Filed May 18, 1937.)

IN THE UNITED STATES CIRCUIT COURT OF APPEALS,
FOR THE THIRD CIRCUIT.

No. 5801. October Term, 1936.

National Biscuit Company,
Plaintiff-Appellant,
against

Kellogg Company,
Defendant-Appellee.

PLEASE TAKE NOTICE that on Thursday, May 13, 1937, at 10 o'clock in the forenoon or as soon thereafter as counsel can be heard, I shall apply to the United States Circuit Court of Appeals for the Third Circuit or to one of the members thereof at the courtroom of said court in the Post Office Building, Ninth and Chestnut Streets, Philadelphia, Pennsylvania, for an order restraining and enjoining the plaintiff, its agents, attorneys, servants, employees and all persons under its control; from falsely representing to the trade and public that the defendant the Kellogg Company has been enjoined from the manufacture and sale of shredded wheat or from using the name, shape or form of the said product and further restraining and enjoining the plaintiff from in any way using the last decision of this Court or any parts thereof for advertising publicity or trade purposes or otherwise attempting to injure and damage the business reputation of the defendant or from exploiting the business of the plaintiff through the use of the said decision, and from suggesting to the trade that the stocks of Kellogg's shredded wheat

biscuit should be rejected or returned to the defendant or in any way competing unfairly with the defendant, pending the final determination of this cause and for such other and further relief as to this Court may seem just and proper.

Such application will be based upon the affidavits of Crichton Clarke, Esq., John N. Kane and Charles Miller, all sworn to the tenth day of May, 1937, and hereto annexed, together with the exhibits referred to in said affidavits.

Yours, etc.,

CRICTON CLARKE,
Counsel for Defendant-Appellee.
Office and P. O. Address,
36 West Forty-fourth Street,
Borough of Manhattan,
New York, N. Y.

To: CHARLES A. VILAS,
Counsel for Plaintiff-Appellant,
36 West Forty-fourth Street,
New York, N. Y.

DEPOSITION OF CHARLES MILLER.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS,
FOR THE THIRD CIRCUIT.

No. 5801. October Term, 1936.

National Biscuit Company,

Plaintiff-Appellant,

against

Kellogg Company,

Defendant-Appellee.

STATE OF NEW YORK,
COUNTY OF NEW YORK,] ss.:

CHARLES MILLER being duly sworn deposes and says:

I reside in Rego Park, Queens, Long Island, and am a jobber salesman for the Kellogg Sales Company, Eastern representatives of Kellogg Company, defendant-appellee herein. My territory covers Manhattan and Brooklyn.

During the past three weeks, particularly in the last week, in calling upon my customers, all of whom are and have been for many years purchasers of various products of the Kellogg Company, I have been told that they would not buy any shredded wheat biscuits from the Kellogg Company. In each instance that I have been told this they have stated that the National Biscuit Company told them that the Kellogg Company was under injunction and that they could not purchase further biscuits or sell them to their customers without becoming involved in the litigation. Among the wholesalers whose buyers have stated this to me are Austin Nichols & Co., Seeman Bros., R. C. Williams & Co., and Francis H. Leggett & Co.

Various jobbers have also stated to me that they could not sell any further orders of this product to the retailers since the retailers had been warned by National Biscuit Company representatives that they would become involved in this litigation if they purchased or sold any further stock of this product.

The buyer for Seeman Bros. showed me certain publicity consisting of a mimeographed statement which he would not permit me to take or copy. He also stated that a salesman for the National Biscuit Company and an "executive of the Company" had just called upon him, furnished him this material and advised him that he could not legally sell the product. As a result of this he stated they will not fill any further orders for this product without a written agreement of indemnity and stated that they would return the stock consisting of some two hundred cases at that time.

From my conversations with wholesalers and jobbers and my observation of the trade, it is apparent that the National Biscuit Company has been using portions of the decision of this Court to intimidate wholesalers and jobbers as well as retailers throughout my territory from continuing the sale of the defendant's product without awaiting the final decision on this cause and has attempted at the same time to increase the sale of their own shredded wheat biscuit as well as their other products.

CHARLES MILLER.

Sworn to before me this tenth day of May, 1937.

LENA ROSEN,

(Seal)

Notary Public.

N. Y. Co. Clk.'s No. 165, Reg. No. 9-R-245.

Kings Co. Clk.'s No. 66, Reg. No. 9288.

Commission expires March 30, 1939.

DEPOSITION OF CRICHTON CLARKE.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS,
FOR THE THIRD CIRCUIT.

No. 5801. October Term, 1936.

National Biscuit Company,
Plaintiff-Appellant,
against
Keilogg Company,
Defendant-Appellee.

STATE OF NEW YORK,
COUNTY OF NEW YORK, } ss.:

CRICHTON CLARKE being duly sworn deposes and says:

I am an attorney at law and one of the counsel for the defendant-appellee in the above-entitled cause. I am making this affidavit on behalf of the defendant-appellee in support of an application to enjoin the plaintiff-appellant from circulating in the retail trade various misleading statements and otherwise publicizing the recent decision in this Court on rehearing and using and attempting to use such decision and misleading excerpts therefrom to damage and injure the reputation and trade standing of the defendant-appellee and to increase and promote the sales of plaintiff-appellant's shredded wheat and other products. Annexed hereto and marked Exhibits A, B, C and D are copies of printed and mimeographed circulars which I am informed and believe have been circulated broadside throughout the grocery trade over the entire country at the instigation of the plaintiff-appellant.

Exhibit A as I am informed and believe was secured by a salesman of the defendant-appellee in Pittsburgh, Pennsylvania; Exhibit B at Lynchburg, Virginia; Exhibit C at San Francisco, California, and

Exhibit D at Syracuse, New York. These are put out by wholesale grocers and chain stores at the instigation of plaintiff-appellant.

The sources of my information and the grounds of my belief as to the source and origin of these documents are telephone conversations with the officers of the defendant-appellee corporation in Battle Creek, Michigan, personal conferences with one of such officers in New York, copies of inter-office correspondence and memoranda from salesmen and the affidavits annexed hereto. None of these officers or salesmen are available in New York or Philadelphia at the present time.

In my opinion the excerpts quoted from the decision of this Court place an unfair emphasis upon one incident referred to by the Court rather than upon the merits of the entire controversy, or upon the so-called rights of this plaintiff. It is also my opinion that they endeavor to prejudice the general business of the defendant-appellee by reference to this particular incident and to attempt to exploit the plaintiff-appellant's business in all its products by reason of reference to increased discounts and other matters having nothing to do with this cause without awaiting the determination of the petition for rehearing pending herein or of an application for certiorari which defendant-appellee will make should such petition for rehearing be denied.

This publicity being circulated by plaintiff-appellant represents an attempt to use the decision of this Court as an advertising wedge and publicity and to spread this decision throughout the entire trade as news, thereby using the decision of this Court as free publicity.

CRICTON CLARKE.

Sworn to before me this tenth day of May, 1937.

MARGARET C. HAYDEN,

(Seal) *Notary Public, Westchester County.*

N. Y. Co. Clk.'s No. 717, Reg. No. 9-H-462.

Commission expires March 30, 1939.

DEPOSITION OF JOHN N. KANE.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS,
FOR THE THIRD CIRCUIT.

No. 5801. October Term, 1936.

{ *National Biscuit Company,*,
Plaintiff-Appellant,
against
Kellogg Company,,
Defendant-Appellee.

STATE OF NEW YORK, } ss.:
COUNTY OF NEW YORK,

JOHN N. KANE being duly sworn deposes and says:

I reside at No. 170-17 Mitchell Avenue, Flushing, Long Island. I am the district sales manager of the Kellogg Sales Company, Eastern sales representatives of the Kellogg Company of Battle Creek, Michigan, and am in charge of the sales of all Kellogg products throughout the States of New York, Connecticut and New Jersey. I have read the affidavits of Crichton Clarke and Charles Miller and have seen the exhibits annexed to the affidavit of Mr. Clarke.

From my conversations with salesmen both in the office and by telephone in other territories, I am informed and believe that the plaintiff-appellant herein has circulated publicity matter identical with and similar to the exhibits annexed to the affidavit of Crichton Clarke broadcast throughout my territory reaching all wholesalers, jobbers and retailers in the grocery trade. Seeman Bros., wholesalers, and Sheffield Farms, a chain store, have requested me to give them written agreements of indemnity against any damages resulting from the disposition of their present stock of Kel-

logg Company shredded wheat biscuits and various others have made similar requests to my salesmen as I am informed and believe.

JOHN N. KANE.

Sworn to before me this tenth day of May, 1937.

(Seal)

LENA ROSEN,

Notary Public.

N. Y. Co. Clk.'s No. 165, Reg. No. 9-R-245.

Kings Co. Clk.'s No. 66, Reg. No. 9288.

Commission expires March 30, 1939.

Manufacturer-Jobber Associates, Inc.

SPONSORING



FAIRLAWN STORES

11 WEST 42nd STREET
NEW YORK CITY

Phone:

Ackerman 4-3382

#804-April 26, 1937.

TO FAIRLAWN UNITS:

NATIONAL BISCUIT'S SHREDDED WHEAT

In connection with the May 7th-8th scheduled featured sale of Shredded Wheat, the National Biscuit Co. has asked me to quote to you the following excerpts from the National Biscuit Co.'s recently issued Bulletin:-

"NATIONAL BISCUIT COMPANY

WINS SHREDDED WHEAT DECISION

Court Enjoins Kellogg Company from Use of
Shredded Wheat in Name, Shape or Form.

PHILADELPHIA: April 12. U.S. Circuit Court of Appeals for the Third Circuit today reversed a former decision in the case of National Biscuit Co. v. Kellogg Company involving the use of the trade name "Shredded Wheat". The court declared that the Kellogg Company employed "unfair competition and untruthful statements to deceive the public and secure the trade which in equity and good conscience belonged to the plaintiff."

Following is an excerpt from Judge J. Warren Davis' opinion:

"The defendant (Kellogg Company) appropriated not only the name of the plaintiff's product (Shredded Wheat), but also its form and shape which has characterized the biscuit for more than forty years. In order to secure the property of the plaintiff in the name and form of its product, the defendant placed upon its cartons the words, 'The original has this signature: W.K. Kellogg'. That is, defendant not only adopted the name and form of plaintiff's product, but also claimed that its product was the original and by implication that the plaintiff's was an imitation. There could have been but one object for doing this, and that was by unfair competition and untruthful statements, to deceive the public and secure the trade which in equity and good conscience belonged to the plaintiff."

"... A decree will be entered vacating our former decree and reversing the decree of the District Court with directions to the court to enter a decree enjoining the defendant (Kellogg Co.) from the use of the name 'Shredded Wheat' as its trade name and from advertising or offering for sale its product in the form and shape of plaintiff's biscuit in violation of its trademark; and with further directions to order an accounting for damages and profits."

"Shredded Wheat, a product of the National Biscuit Company has been manufactured at Niagara Falls, N.Y. since 1900."

We comply with N.B. Co.'s request because of their cooperation with us by way of Headquarters allowance, Table Topics Advertising, Entertainment Contributions, etc.

Fairlawn Jobbers will know better than we do what they must do about their stocks of Kellogg's Product, labelled, "Shredded Wheat Biscuit" and what care they must use in advertising this Product.

The National Biscuit Co. also points out that in the case of several Units, at least, if they would concentrate attention on the National Biscuit Co. line,

Exhibit "A".

Headquarters allowance, Table Topics Advertising, Entertainment contributions, etc.

Pearlawn Jobbers will know better than we do what they must do about their stocks of Kellogg's Product, labelled, "Shredded Wheat Biscuit" and what car they must use in advertising this Product.

The National Biscuit Co. also points out that in the case of several units, at least, if they would concentrate attention on the National Biscuit Co. line, total retail biscuit sales would increase and the allowance basis would run higher than the present 3%.

G.C.Jolliffe, Secretary.

p.s. The New Castle Unit March sales of National Biscuit's average \$50.10 per store earning 1 1/2% extra Headquarters Allowance.

2139

55

CCJ.

EXHIBIT B.

COURT RULING.

In one of the most sweeping decisions ever handed down by the Courts, the Kellogg Company has been disbarred from the further manufacture or sale of their **SHREDDED WHEAT**, as such. The courts have held that the right to use the words **SHREDDED WHEAT** is an exclusive property of the National Biscuit Company.

The decision will, of course, disbar jobber and retail sales of any product termed **SHREDDED WHEAT** manufactured by anyone now or in the future, other than the **NATIONAL BISCUIT COMPANY**.

EXHIBIT C.

BOTSFORD, CONSTANTINE & GARDNER
Russ Building, San Francisco

FOR IMMEDIATE RELEASE

**NATIONAL BISCUIT CO.
WINS SHREDDED WHEAT DECISION**

Court Enjoins Kellogg Co. from Use of Shredded
Wheat in Name, Shape or Form

PHILADELPHIA: April 12: U. S. Circuit Court of Appeals for the Third Circuit today reversed a former decision in the case of National Biscuit Company vs. Kellogg Company involving the use of the trademark "Shredded Wheat." The court declared that the Kellogg Company employed "unfair competition and untruthful statements to deceive the public and secure the trade which in equity and good conscience belonged to the plaintiff."

Following is an excerpt from Judge J. Warren Davis' opinion:

"The defendant (Kellogg Company) appropriated not only the name of the plaintiff's product (Shredded Wheat), but also its form and shape which has characterized the biscuit for more than forty years. . . .

"In order to secure the property of the plaintiff in the name and form of its product, the defendant placed upon its cartons the words, 'The original has this signature: W. K. Kellogg.' That is, defendant not only adopted the name and form of plaintiff's product, but also claimed that its product was the original and by implication that the plaintiff's was an imitation. There could have been but one object for doing this, and that was by unfair competition and untruthful statements, to deceive the public and secure the trade which in equity and good conscience belonged to the plaintiff.

". . . a decree will be entered vacating our former decree and reversing the decree of the District Court with directions to the Court to enter a decree enjoining the defendant (Kellogg Co.) from the use of the name 'Shredded Wheat' as its trade name and from advertising or offering for sale its product in the form and shape of plaintiff's biscuit in violation of its trademark; and with further directions to order an accounting for damages and profits."

"Shredded Wheat," a product of the National Biscuit Company has been manufactured at Niagara Falls, N. Y. since 1900.

2 copies received May 10, 1937, 4 P. M.

C. A. Vilas,
Atty. for Plaintiff.

PUSH

SHREDDED

WHEAT NOW!

The U. S. Circuit Court of Appeals reversed a former decision in the case of National Biscuit Company vs. Kellogg Company involving the use of the trade name "Shredded Wheat". The court declared that the Kellogg Company employed "unfair competition and untruthful statements to deceive the public and secure the trade which in equity and good conscience belonged to the plaintiff".

Following is an excerpt from Judge J. Warren Davis' opinion:
"The defendant (Kellogg Company) appropriated not only the name of the plaintiff's product (Shredded Wheat), but also its form and shape which has characterized the biscuit for more than forty years. . . .

"In order to secure the property of the plaintiff in the name and form of its product, the defendant placed upon its cartons the words, 'The original has this signature: W. K. Kellogg'. That is, defendant not only adopted the name and form of plaintiff's product, but also claimed that its product was the **original** and by implication that the plaintiff's was an **imitation**. There could have been but one object for doing this, and that was by unfair competition and untruthful statements, to deceive the public and secure the trade which in equity and good conscience belonged to the plaintiff.

" . . . a decree will be entered vacating our former decree and reversing the decree of the District Court with directions to the court to enter a decree enjoining the defendant (Kellogg Co.) from the use of the name 'Shredded Wheat' as its trade name and from advertising or offering for sale its product in the form and shape of plaintiff's biscuit in violation of its trademark; and with further directions to order an accounting for damages and profits."

"Shredded Wheat" a product of the National Biscuit Company has been manufactured at Niagara Falls, N. Y. since 1900.

The publicity given the above will create an increased consumer demand for "Shredded Wheat" made by the National Biscuit Company. You and your retailers should get your share by aggressive merchandising. The N.B.C. salesmen are equipped to give you advertising displays and other necessary help to carry on an active campaign.

EXHIBIT "D."

BIDDLE PURCHASING COMPANY

107 CHAMBERS ST., NEW YORK, N. Y.

2143



**NOTICE OF MOTION FOR WITHDRAWAL OF
OPINION, ETC.**

(Filed May 18, 1937.)

IN THE UNITED STATES CIRCUIT COURT OF APPEALS,
FOR THE THIRD CIRCUIT.

No. 5801. October Term, 1936.

National Biscuit Company,
Plaintiff-Appellant,
against
Kellogg Company,
Defendant-Appellee.

PLEASE TAKE NOTICE that upon the notice of motion herein served upon you on the tenth day of May, 1937, and upon the affidavits of Charles A. Miller, Crichton Clarke and John N. Kane thereto annexed and upon all the exhibits forming part of such application, the undersigned will upon the return thereof and under the prayer of said notice of motion "for such other and further relief as to the Court may seem just and proper" apply to the Court pursuant thereto for an order granting further relief as follows:

1. Denying to the plaintiff-appellant herein any and all relief by virtue of the opinion on rehearing of this Court.
2. Withdrawing the said opinion of this Court and denying the issuance of a mandate thereunder and reinstating the original decision of this Court.

To Charles A. Vilas, Esq.,

Counsel for Plaintiff-
Appellant,

36 West 44th Street,
New York, N. Y.

Copy received May 15, 1937.

CRICHTON CLARKE,

Counsel for Defendant-
Appellee.

35 West 44th Street,
New York, N. Y.

CHARLES A. VILAS,
Attorney for Plaintiff-Appellant.

AFFIDAVITS IN OPPOSITION TO APPELLEE'S MOTIONS.

(Filed May 18, 1937.)

IN THE UNITED STATES CIRCUIT COURT OF APPEALS,
FOR THE THIRD CIRCUIT.

No. 5801. October Term, 1936.

National Biscuit Company,
Plaintiff-Appellant,
against
Kellogg Company,
Defendant-Appellee.

AFFIDAVIT OF CHARLES A. VILAS.STATE OF NEW YORK, }
COUNTY OF NEW YORK, }ss.:

CHARLES A. VILAS, being duly sworn, deposes and says:

1. I am an attorney and counsellor-at-law and reside at Rye, New York. I am one of the attorneys for the plaintiff in the above entitled action and have been in charge for National Biscuit Company of the prosecution of this action since its inception in 1932. I am familiar with all the proceedings had herein and in other and previous litigation between The Shredded Wheat Company and the Kellogg Company.

2. I have read the affidavits submitted by the defendant in support of its motion for a restraining order against the plaintiff in this action and am familiar with the contents of the same. Immediately after the rendition of this Court's decision on April 12th, 1937, the officers of the National Biscuit Company were advised by me of the fact, and were cautioned by me that while it was entirely lawful and proper that announcement

of the decision of the Court might be made through the press and by communications with its customers, no other or further use of the decision might be made in any such manner as to result in unfair competition or in undue injury to the defendant company. They were further advised that all inquiries by customers as to the legal effect of the decision or as to their future conduct with the Kellogg Company by reason of the decision should not be answered but all customers should be required to determine such questions for themselves. To the best of my knowledge and belief these instructions have been faithfully complied with by the National Biscuit Company, its officers and employees.

3. It will be noted that the allegations contained in the affidavits filed by the defendant in support of its motion are all hearsay and second-hand statements. There are filed herewith affidavits from the salesmen and executives of the National Biscuit Company who have actually contacted the customers mentioned in the defendant's affidavits and their positive first-hand statements and denials are entitled to greater weight and credence than the unsupported hearsay produced by the defendant.

4. Shortly after the decision of this Court on April 12th, 1937, there appeared in a magazine known as "Printers' Ink", issue of April 29th, 1937, page 76, an article apparently sponsored by the defendant company, a true copy of which is attached hereto and marked Exhibit B. Said article refers to a suit brought by the Kellogg Company, defendant here, against National Biscuit Company, plaintiff here, in the Southern District of New York for attempted monopoly in violation of the Sherman Anti-Trust Act and states that it involved the same set of facts and that the decision of the Circuit Court of Appeals for the Second Cir-

cuit upheld the Kellogg Company's complaint and is, therefore, in conflict with the decision of this Court.

5. Inasmuch as the inference carried in said article is erroneous, unfair and deceptive it seems appropriate at this place to record for the information of this Court the true facts. On August 4th, 1932, shortly after the commencement of the suit at bar, the Kellogg Company filed two actions against the National Biscuit Company in the United States District Court for the Southern District of New York, both of them purporting to be based upon alleged attempted monopoly by the National Biscuit Company of the manufacture and sale of Shredded Wheat Biscuit in violation of the Sherman Anti-Trust Act. One of the allegations in the complaints in said actions was that National Biscuit Company had brought a vexatious and unjustifiable action against the Kellogg Company in bad faith in the United States District Court for Delaware. This was the action which has just been decided by this Court in favor of the National Biscuit Company. The decision of this Court is a conclusive answer to the suit in the Southern District of New York and, therefore, the allegation of the defendant in the article referred to, reiterated in its motion for a rehearing recently filed herein, is untrue.

6. Neither is it wholly true that the Circuit Court of Appeals for the Second Circuit has upheld the complaint in the action which was before it. One of the two actions commenced by the defendant against the plaintiff was dismissed by Judge Bondy for lack of jurisdiction, holding that it did not state any cause of action under the Anti-Trust Law and was, therefore, brought in the wrong venue. The second case, a cause of action at law for treble damages, met a like fate at the hands of Judge Caffey but his action was reversed by the Circuit Court of Appeals for the Second Circuit which held that so much of the com-

plaint as dealt with the actions of the National Biscuit Company subsequent to its acquisition of The Shredded Wheat Company would "withstand demurrer". Judge Caffey's ruling as to the balance of the complaint which dealt with events taking place prior to 1930 was affirmed. Subsequently Judge Caffey struck out large portions of the plaintiff's complaint absolutely and other portions conditionally upon the plaintiff amending its complaint. This occurred in the fall of 1934 since which time plaintiff, Kellogg Company, has not yet succeeded in filing an amended complaint to the satisfaction of Judge Caffey. The case, therefore, is not yet at issue.

7. Counsel for the National Biscuit Company, plaintiff in this case, are familiar with the rules of the courts concerning the use in advertising of decrees in patent and trade-mark cases and have carefully advised the officers of the National Biscuit Company concerning their rights and obligations in that regard. I have made diligent inquiry and as a result of my conversations with officers and employees of the National Biscuit Company I verily believe that no improper use has been made by that company or anyone in its employ of the opinion of this Court, and that the difficulties of which the defendant is complaining are those naturally incident to a decision of this kind which finds the defendant guilty of practices regarded by courts of law as unfair.

CHARLES A. VILAS.

Sworn to before me this 13th day of May, 1937.

(Seal) GEORGE H. KLEIN,
Notary Public, Bronx County.
Bronx Co. Clerk's No. 58, Reg. No. 24-K-39.
N. Y. Co. Clerk's No. 447, Reg. No. 9-K-268.
Kings Co. Clerk's No. 47, Reg. No. 9188.
Commission expires March 30, 1939.

EXHIBIT B.**APPEALS SHREDDED WHEAT CASE.**

The Kellogg Company of Battle Creek, Mich., announced on Monday of this week that it was filing a petition for review in connection with the reversal of the decision made by the U. S. Circuit Court of Appeals in Philadelphia on the Shredded Wheat trademark, announced April 12. If the petition is denied, the company expects to apply for a writ of certiorari from the Supreme Court of the United States.

The litigation is between National Biscuit Company and the Kellogg Company over the Shredded Wheat product.

The suit was first tried in the U. S. District Court at Wilmington, Del., with a decision favorable to the Kellogg Company. This decision was appealed and affirmed by the U. S. Circuit Court of Appeals in Philadelphia prior to the reversal just announced.

On the same state of facts as are involved in the Delaware litigation, the Kellogg Company brought suit against National Biscuit Company in the Southern District of New York, alleging violation of the Sherman Anti-Trust Act for attempted monopoly of the manufacture and sale of patents-expired Shredded Wheat.

The Circuit Court of Appeals of the Second Circuit unanimously upheld the Kellogg Company's complaint as constituting a good cause of action under the Sherman Anti-Trust Act.

The decision of the Court of Appeals in Philadelphia is, therefore, apparently in conflict with the decision of the Court of Appeals in New York.

AFFIDAVIT OF CLYDE S. STILWELL.

**IN THE UNITED STATES CIRCUIT COURT OF APPEALS,
FOR THE THIRD CIRCUIT.**

No. 5801. October Term, 1936.

National Biscuit Company,
Plaintiff-Appellant,
against

Kellogg Company,
Defendant-Appellee.

STATE OF NEW YORK, } ss.:
COUNTY OF NEW YORK,

CLYDE S. STILWELL, being duly sworn, deposes and says:

1. I reside at 133 East 64th Street, New York City, New York, and am an attorney and counsellor-at-law of the State of New York and vice-president and general counsel of National Biscuit Company, plaintiff above named, and as such am in charge of its legal affairs.

2. I have read the notice of motion and the affidavits in support thereof, each verified May 10, 1937, and am familiar with the contents thereof.

3. Immediately after the decision of this Court, filed April 12, 1937, I instructed Urban Kreidler and other officials of the sales department of National Biscuit Company that it is legal and proper for National Biscuit Company to advise its customers of the fact of the making of the decision by this Court; I advised them further that it should not be used in any manner whatsoever as a threat or an unfair means of sales propaganda and that all customers of the company

should be permitted to draw their own inferences as to what action, if any, they should take with respect to their dealings with the defendant.

4. Upon information and belief, based upon conversations with officials of the sales department and upon correspondence, these instructions have been faithfully carried out by the officials and employees of National Biscuit Company and to the best of my knowledge and belief no improper or unfair use has been made by the company of the decision.

CLYDE S. STILWELL.

Sworn to before me this eleventh day of May, 1937.

(Seal)

A. T. BULLOCK,

Notary Public, Queens Co. No. 204.

Registered in Queens Co. No. 152.

Certificate filed in New York Co. No. 62.

Registered in New York Co. No. 8-B-47.

Commission expires March 30, 1938.

AFFIDAVIT OF WILLIAM W. ROSSITER, JR.

**IN THE UNITED STATES CIRCUIT COURT OF APPEALS,
FOR THE THIRD CIRCUIT.**

No. 5801. October Term, 1936.

National Biscuit Company,
Plaintiff-Appellant,
against
Kellogg Company,
Defendant-Appellee.

STATE OF NEW YORK, }ss.:
COUNTY OF NEW YORK,

WILLIAM W. ROSSITER, JR., being duly sworn, deposes and says:

1. I reside at 281 Montrose Avenue, South Orange, New Jersey, and am the sales manager of National Biscuit Company in charge of sales of all of the products manufactured by the company.

2. Immediately after the decision of this Court in the above-entitled case, filed April 12, 1937, I was advised of that fact by the legal department of National Biscuit Company and instructed that it would be proper for the sales department to advise the trade of the fact of the decision but that it should not be used in any manner whatsoever as a threat or as a means of intimidation to the trade and the trade should be permitted to take such action as they might be advised without the suggestion of any representative of the National Biscuit Company. These instructions were passed on to my subordinates who contact

the trade and to the best of my knowledge and belief have been wholly complied with.

3. I have read the affidavits of Crichton Clarke, John N. Kane and Charles Miller, each verified May 10, 1937, and upon information and belief, based upon my instructions to my salesmen and upon correspondence and conversations with salesmen under my control, state that the National Biscuit Company has never made any false representations to the trade concerning the legal effect of the said decision or any attempt to injure and damage the business reputation of the Kellogg Company or to exploit the business of the plaintiff by the use of the decision or to suggest that stocks of Kellogg's Shredded Wheat Biscuit should be rejected or returned. On the contrary, the use which the National Biscuit Company has made of the decision of this Court has been strictly confined to advising the trade of the fact of the decision, furnishing some of the trade with copies thereof, and issuing the announcement thereof comprised in Exhibit A attached to these papers.

WILLIAM W. ROSSITER, JR.

Sworn to before me this twelfth day of May, 1937.

(Seal) A. T. BULLOCK,
Notary Public, Queens Co. No. 204.
Registered in Queens Co. No. 152.
Certificate filed in New York Co. No. 62.
Registered in New York Co. No. 8-B-47.
Commission expires March 30, 1938.

EXHIBIT "A."

NATIONAL BISCUIT CO. WINS SHREDDED WHEAT DECISION

**Court Enjoins Kellogg Co. from Use
of Shredded Wheat in Name,
Shape or Form.**

PHILADELPHIA: April 12: U. S. Circuit Court of Appeals for the Third Circuit today reversed a former decision in the case of National Biscuit Company vs. Kellogg Company involving the use of the trade name "Shredded Wheat." The court declared that the Kellogg Company employed "unfair competition and untruthful statements to deceive the public and secure the trade which in equity and good conscience belonged to the plaintiff."

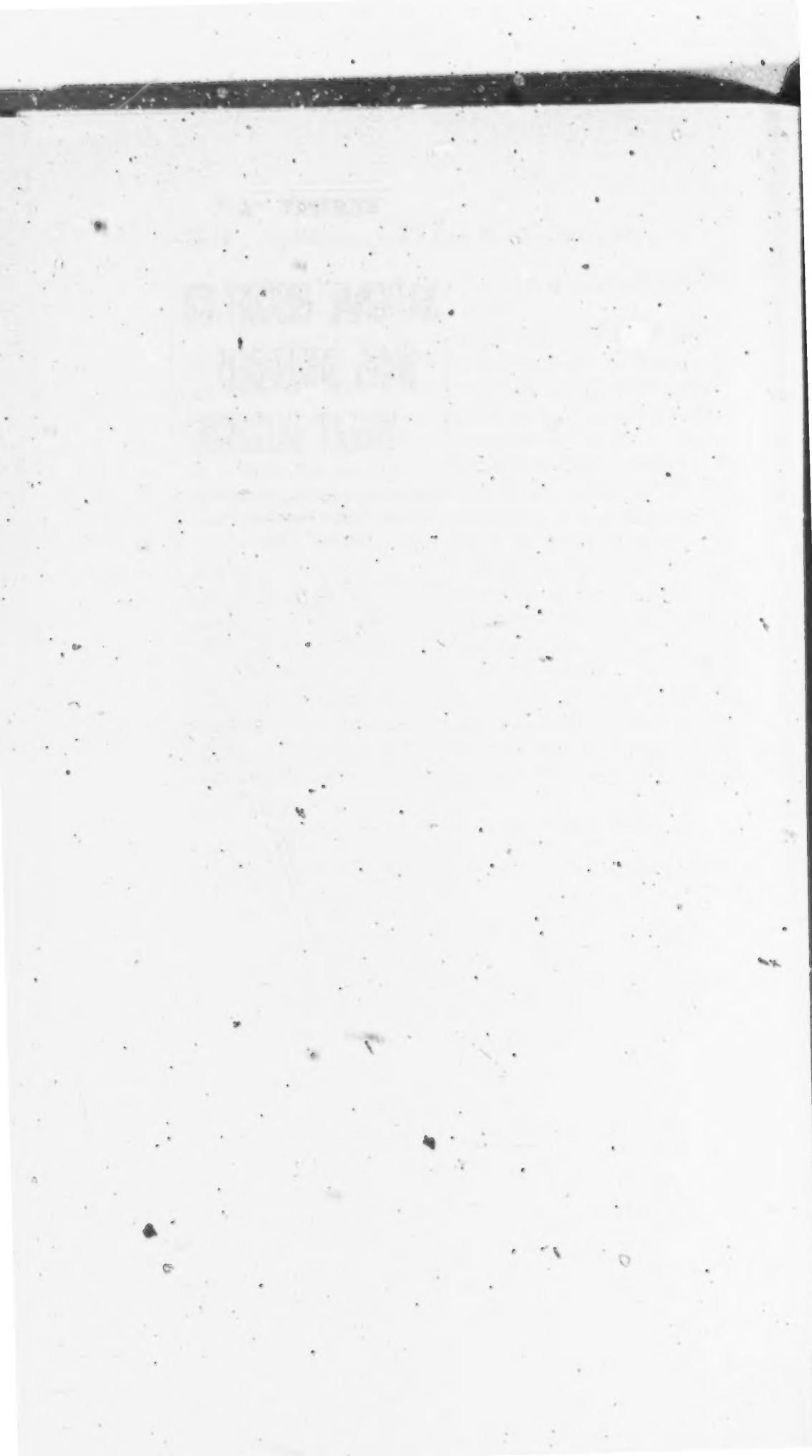
Following is an excerpt from Judge J. Warren Davis' opinion:

"The defendant (Kellogg Company) appropriated not only the name of the plaintiff's product (Shredded Wheat), but also its form and shape which has characterized the biscuit for more than forty years . . .

"In order to secure the property of the plaintiff in the name and form of its product, the defendant placed upon its cartons the words, 'The original has this signature: W. K. Kellogg'. That is, defendant not only adopted the name and form of plaintiff's product, but also claimed that its product was the original and by implication that the plaintiff's was an imitation. There could have been, but one object for doing this, and that was by unfair competition and untruthful statements, to deceive the public and secure the trade which in equity and good conscience belonged to the plaintiff.

" . . . a decree will be entered vacating our former decree and reversing the decree of the District Court with directions to the court to enter a decree enjoining the defendant (Kellogg Co.) from the use of the name 'Shredded Wheat' as its trade name and from advertising or offering for sale its product in the form and shape of plaintiff's biscuit in violation of its trademark; and with further directions to order an accounting for damages and profits."

* "Shredded Wheat" a product of the National Biscuit Company, has been manufactured at Niagara Falls, N. Y. since 1900.



AFFIDAVIT OF HENRY E. MEISTER.

**IN THE UNITED STATES CIRCUIT COURT OF APPRAISALS,
FOR THE THIRD CIRCUIT.**

No. 5801. October Term, 1936.

National Biscuit Company,
Plaintiff-Appellant,

against

Kellogg Company,
Defendant-Appellee.

STATE OF NEW YORK, } ss.:
COUNTY OF NEW YORK,

HENRY E. MEISTER, being duly sworn, deposes and
says:

1. I reside at 237-22 93d Road, Queens Village,
New York. I am a special salesman in the employ of
the National Biscuit Company, Shredded Wheat Division,
and my duties include contacting the jobber trade
in cities of New York.

2. I have read the affidavit of Charles Miller, verified May 10, 1937, filed by the defendant in support of its motion for a restraining order in the above case.

3. Shortly after April 12, 1937, the date upon which this Court rendered its opinion and decision on rehearing in the above case, I called upon Seeman Brothers, Inc., a jobber in New York City, in company with J. M. Cooper, sales representative, and talked with the buyer or assistant buyer of that firm. We informed them of the fact that a decision had been rendered in the suit of National Biscuit Company against Kellogg Company and showed the buyer a copy of the decision and also a copy of the press re-

lease concerning the same, a copy of which is annexed hereto marked Exhibit A.

4. Neither Mr. Cooper nor I stated to the buyer or to anyone connected with Seeman Brothers, Inc., that Seeman Brothers, Inc., could not legally sell Kellogg's product. The buyer asked us what he should do with the stock of Kellogg's Whole Wheat Biscuit which he had on hand and we replied that we did not know and could not advise him on that subject.

5. I am informed and believe that Mr. J. M. Cooper is the "executive of the Company" referred to in the said affidavit of Charles Miller and that he is at present absent from New York on business.

6. I also at about the same time called on R. C. Williams & Company and Francis H. Leggett & Company, two other jobbers mentioned in the affidavit of Charles Miller, and had similar conversations with them. At no time did I, or to my knowledge any other representative of National Biscuit Company, advise any of the above firms or any other customer upon whom we called that they could not sell Kellogg's product legally or that if they did they would be liable to be drawn into litigation. My instructions from my superiors were simply to call the attention of the customers of National Biscuit Company to the fact that a decision had been rendered by this Court to the effect that the name "Shredded Wheat" was the property of National Biscuit Company.

HENRY E. MEISTER.

Sworn to before me this eleventh day of May, 1937.

(Signed)

A. T. BULLOCK,

Notary Public, Queens Co. No. 204.

Registered in Queens Co. No. 152.

Certificate filed in New York Co. No. 62.

Registered in New York Co. No. 8-B-47.

Commission expires March 30, 1938.

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**Court Enjoins Kellogg Co. from Use
of Shredded Wheat in Name,
Shape or Form.**

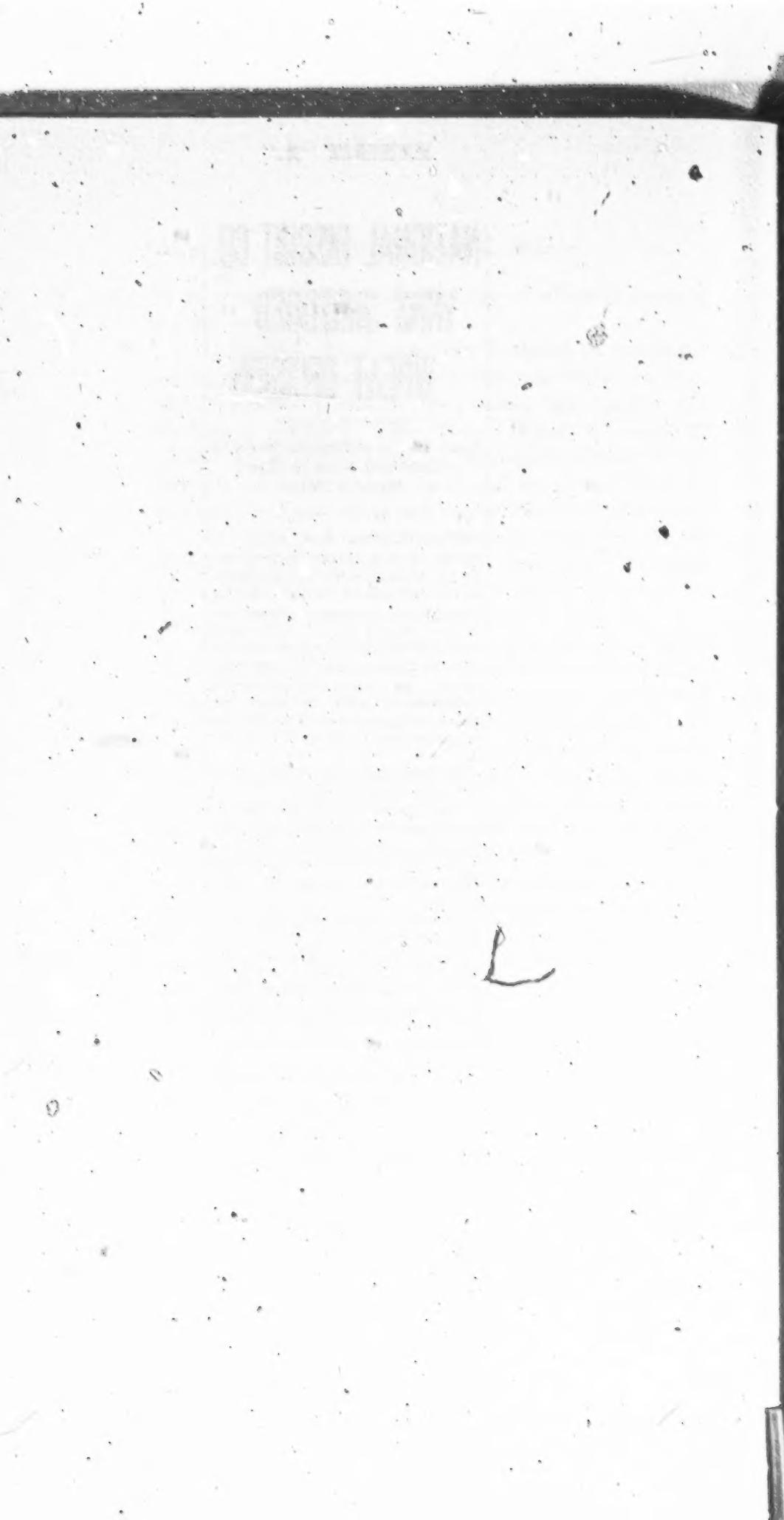
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"...a decree will be entered vacating our former decree and reversing the decree of the District Court with directions to the court to enter a decree enjoining the defendant (Kellogg Co.) from the use of the name 'Shredded Wheat' as its trade name and from advertising or offering for sale its product in the form and shape of plaintiff's biscuit in violation of its trademark; and with further directions to order an accounting for dam-



AFFIDAVIT OF JAMES M. COOPER.

**IN THE UNITED STATES CIRCUIT COURT OF APPEALS,
FOR THE THIRD CIRCUIT.**

No. 5801. October Term, 1936.

National Biscuit Company,
Plaintiff-Appellant,
against
Kellogg Company,
Defendant-Appellee.

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

JAMES M. COOPER, being duly sworn, deposes and says:

1. I reside at 240 West 57th Street, New York, N. Y. I am a sales representative of National Biscuit Company and my duties comprise visiting the trade in company with the salesmen of National Biscuit Company and generally promoting the sale of products manufactured by the company.

2. I have read the affidavit of Charles Miller, verified May 10, 1937, filed by the defendant in support of its motion for a restraining order in the above case. I have also read the affidavit of Henry E. Meister, verified May 11, 1937, attached to these papers.

3. I am doubtless the "executive of the Company" referred to in the affidavit of Charles Miller, as I accompanied Henry E. Meister when he called upon the buyer of Seeman Brothers, Inc., shortly after April 12, 1937. The facts concerning said call stated in the affidavit of Mr. Meister are entirely correct. Our instructions concerning the use of this Court's opinion

were very definite that it might be communicated to the trade, but that no suggestion should be made by us to any customer as to what he should do with his stocks or as to what attitude he should take with reference to the Kellogg Company by reason of the decision. These instructions were fully complied with by me and by all representatives of the National Biscuit Company of whom I have any knowledge. In the case of Seeman Brothers, Inc., we informed the buyer that we could not give him any advice as to what he should do with the stock of Kellogg's Whole Wheat Biscuit on hand.

JAMES M. COOPER.

Sworn to before me this twelfth day of May, 1937.

(Seal)

A. T. BULLOCK,

Notary Public, Queens Co. No. 204.

Registered in Queens Co. No. 152.

Certificate filed in New York Co. No. 62.

Registered in New York Co. No. 8-B-47.

Commission expires March 30, 1938.

AFFIDAVIT OF JOHN B. YODICE.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS,
FOR THE THIRD CIRCUIT.

No. 5801. October Term, 1936.

National Biscuit Company,
Plaintiff-Appellant,
against
Kellogg Company,
Defendant-Appellee.

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

JOHN B. YODICE, being duly sworn, deposes and says:

1. I reside at 1130 70th Street, Brooklyn, New York, and am the manager of the Ridgewood Agency of National Biscuit Company, located at 6047 Metropolitan Avenue, Brooklyn, New York.

2. My duties include contacting the jobber trade in my territory for the purpose of selling Shredded Wheat and among others I visit the buyer of Austin Nichols & Company, located at North Third Street and Kent Avenue, Williamsburg, Brooklyn, New York.

3. I have read the affidavit of Charles Miller, verified May 10, 1937, and am familiar with the contents thereof. Shortly after the decision of this Court, filed April 12, 1937, I had occasion to call upon Mr. Vincent Clark, one of the buyers for Austin Nichols & Company. Mr. Clark stated to me at that time that he had noticed the fact that the National Biscuit Company had won its case against the Kellogg Company and that he was glad to hear it. On a later occasion I

again called on Mr. Clark and gave him one of the company's press releases like Exhibit A annexed to these papers. Mr. Clark at that time informed me that he had since the decision of this Court purchased five (5) cases of Kellogg's Whole Wheat Biscuit from the defendant.

4. The above and foregoing is the entire substance of the conversations which I have had with any representative of Austin Nichols & Company concerning the decision in this case. I have never told anyone connected with Austin Nichols & Company nor any other customer of National Biscuit Company that they would become involved in this litigation if they purchased or sold any further stock of the Kellogg Company's Whole Wheat Biscuit, nor have I told any customer of the company that they could not legally sell the Kellogg product.

JOHN B. YODICE.

Sworn to before me this eleventh day of May, 1937.

(Seal)

A. T. BULLOCK,
Notary Public, Queens Co. No. 204.
Registered in Queens Co. No. 152.
Certificate filed in New York Co. No. 62.
Registered in New York Co. No. 8-B-47.
Commission expires March 30, 1938.

AFFIDAVIT OF CHARLES A. VILAS.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS,
FOR THE THIRD CIRCUIT.

No. 5801. October Term, 1936.

National Biscuit Company,
Plaintiff-Appellant,
against
Kellogg Company,
Defendant-Appellee.

STATE OF NEW YORK, } ss.:
COUNTY OF NEW YORK,

CHARLES A. VILAS, being duly sworn, deposes and says:

Supplementing my affidavit, verified May 13, 1937, an article similar to that referred to in paragraph 4 of my said affidavit appeared in the Commercial Bulletin of May 7, 1937, a trade paper published in Los Angeles, California. A copy of page 7 of said paper containing the article is annexed hereto.

A similar article appeared in a trade paper known as the Food Field Reporter, published in New York at about the same time. One of the staff of last-named magazine telephoned me before publishing the article and stated that the article emanated from the Kellogg Company at Battle Creek.

CHARLES A. VILAS.

Subscribed and sworn to before me this eighteenth day of May, 1937.

DAVID J. ORGAIN,

(Seal) Notary Public, New York County.
N. Y. County Clerk's No. 108, Register's No. 8-O-141.
Bronx County Clerk's No. 6, Register's No. 35-Q-38.
Kings County Clerk's No. 59, Register's No. 8095.
Queens County Clerk's No. 960, Register's No. 3621.
Cert. filed with Westchester County Clerk and Reg.
Commission expires March 30, 1938.

C O M M E R C I A L B U L L E T I N

~~ASSEMBLY PASSES STATE PATMAN ACT~~

(Continued from Page 3)

**CALL MASS MEETING TO
DISCUSS LABOR PROBLEM**

 action and present a united front to the organizers, the unions will take complete control of the food trade in Los Angeles and Southern California and add hundreds of thousands of dollars to the expense of operation. It will effect not only large operators, but small dealers if the program is carried out which we understand the organizers have in mind. Thus, our only salvation is to act immediately and concordely."

The attitude of this market can be expected in both attendance at meetings at next Wednesday night's meeting.

~~KELLOGG WILL CONTINUE SHREDDED WHEAT BATTLE~~

Proposed reduction of the state sales tax from 3 to 2½ percent and exemption of restaurant meals from taxation, struck a snag in the Senate Revenue and Taxation Committee this week. The committee refused to act on Assemblyman Ray Williamson's bill to reduce the sales tax claiming such action would mean a loss of \$31,000,000 in revenue to the state during the next two years. Elimination of restaurant meals from the 3 percent tax was turned down for a similar reason. The committee's action does not necessarily bar revision of the law, but materially hampers a proposed change in rate.

The senate took a definite stand on the labor situation this week by passing the Parkman bill containing a provision outlawing sit-down strikes. good cause of action under the Sher-

~~COMMERCIAL BULLETIN~~

ESTABLISHED 1919

**LLOYD L. STAGGERS
H. A. GALTBAUGH
R. W. GRESSER**
Editor and Manager
Business Manager
Associate Editor
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The Commercial Bulletin is the only individual newspaper on the Pacific Coast whose circulation is verified by the AUDIT BUREAU OF CIRCULATIONS.

~~Statewide Regulation Needed~~

LONG BEACH is about to engage in an interesting experiment, to determine whether or not the operation of meat markets can be curtailed by local regulation. The plan is simple. Meats cannot be received or sold except during the hours that inspectors of the health department are at work. They do not work nights or Sundays, thus operating hours can be controlled as a health measure.

This plan is presumed to be legal. In any event, it has worked in Fresno for the last several years. Without any attempt to discourage Long Beach market operators, or in any way to criticize their judgment, we hazard the prediction that their program will fail and that the ordinance will be repealed, or made inoperative, after a few months' operation.

This program will fail, because it will cost Long Beach market operators more money than they are willing to lose in exchange for a shorter work-week. That has been the experience in several other Southern California cities and towns and there is no good reason to believe that it will have any greater success in Long Beach.

Here is the picture: Long Beach is not an isolated community.

In fact, it is surrounded by smaller towns or by thriving neighbor-

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The committee's action does not necessarily bar revision of the law, but materially hampers a proposed change in rate.

The senate took a definite stand on the labor situation this week by passing the Parkman bill containing a provision outlawing sit-down strikes. This measure was passed with but one senate dissenting vote.

This law makes it a misdemeanor for anyone to enter upon the real property in the possession of another, or remain there without a claim, made in good faith, of a legal right to possess against the expressed will of the person having title to it, or his agent. This prohibition would not apply to fishers.

Progress of Other Bills

The unfair practices act has received favorable attention at Sacramento this session, but members of the trade who are acting as guardians for this measure have had considerable difficulty in preventing its being loaded down with amendments, some of which would materially cripple the law. Last reports indicate that all of these proposed amendments have finally been sidetracked and that in its present form, it contains changes designed to strengthen and facilitate enforcement of the measure.

In the matter of liquor control, the King bill, which would have restricted retail licenses for the sale of distilled spirits to stores and places of business which do 90 percent liquor sales, was killed in committee this week. The same committee voted to take no action on the Daley bill which would have required all drinkers of intoxicants to obtain licenses. The Assembly Revenue and Tax Committee also voted to approve a 10 percent deduction for earned incomes under the state income tax law, the same as is allowed under the federal law.

At next Wednesday night's meeting, to determine whether or not the operation of eat markets can be curtailed by local regulation. The plan is very simple. Meats cannot be received or sold except during the hours that inspectors of the health department are at work. They do not work nights or Sundays, thus operating hours can be controlled as a health measure.

This plan is presumed to be legal. In any event, it has worked in Fresno for the last several years. Without any attempt to discourage Long Beach market operators, or in any way to criticize their judgment, we hazard the prediction that their program will fail and that the ordinance will be repealed, or made inoperative, after a few months' operation.

This program will fail, because it will cost Long Beach market operators more money than they are willing to lose in exchange for a shorter work-week. That has been the experience in several other Southern California cities and towns and there is no good reason to believe that it will have any greater success in Long Beach.

Here is the picture: Long Beach is not an isolated community. In fact, it is surrounded by smaller towns, or by thriving neighborhood centers, all of which have large markets. These markets are just about as convenient to a substantial number of Long Beach residents as are those markets located within the city limits. If they cannot buy meats at night or on Sundays in Long Beach, it will be a very simple matter for them to step across, or drive across the city boundary lines and buy anything they need.

A couple of years ago, meat market operators in Pasadena fought strong pressure on the board of City Managers for just such an ordinance. It was adopted, but in less time than it took to get the ordinance on the Pasadena statute books, a loud cry went up demanding its repeal. Instead of waiting until Pasadena markets were open, thousands of customers were going to adjacent towns or neighborhood centers and making their purchases. The loss of business was too severe for the Pasadena operators to stand.

Of course, if the food trade wishes to place itself under the domination of labor union organizers, it can have evening and Sunday day closing without an ordinance. But based on the experience of merchants in other cities where unions are in full control, the price would be prohibitive, for large and small operators alike.

There is just one way that hours can be regulated successfully. That is by state legislation. If it were possible to secure the enactment—perhaps by the initiative route—of an evening and Sunday closing law which would "hold water," the question of local competition would be entirely eliminated. Consumers would need to buy as much, or almost as much merchandise as before, and they would buy during the time prescribed by the state.

Such a program is now in contemplation and it deserves most serious consideration.

Moore's Market Open

Walter C. Fox of Torley's Market, 1135 West Valley in Alhambra, was fined \$25 on a charge of short weight fish sale. A suspended fine of \$50 was fixed upon Walter Miller of Miller's Market at 1518 Mission Road in South Pasadena.

A grocer who finds himself in trouble because of the possession of a petty gambling device has no one to blame but himself. Even if the authorities do not interfere, the ill will of parents and school organizations far more than offsets any "profit" which may be derived.



AFFIDAVIT OF C. F. BAUMGART.

(Filed July 1, 1937.)

IN THE UNITED STATES CIRCUIT COURT OF APPEALS,
FOR THE THIRD CIRCUIT.

No. 5801. October Term, 1936.

National Biscuit Company,
Plaintiff-Appellant,
against
Kellogg Company,
Defendant-Appellee.

STATE OF MICHIGAN, } ss.:
COUNTY OF CALHOUN,

C. F. BAUMGART being duly sworn, deposes and says:

I am the General Salesmen Manager for the Kellogg Sales Company, having charge of the sales of the products of Kellogg Company, the defendant-appellee herein, throughout the United States and foreign countries. In response to a request from Crichton Clarke, Esq., counsel for the Company in such litigation, I requested our salesmen and other representatives to report to me any comments which they heard during their calls upon the retail trade concerning the recent decision of this Court granted upon rehearing, made by representatives, employees or agents of the National Biscuit Company, together with their remarks upon the nature of such comments and the effect thereof upon the trade. In response thereto I have received a large number of direct statements of salesmen. These statements and comments are contained in regular weekly reports and the originals are in the hands of counsel for the Company to be presented to the Court

upon the hearing in this matter, but since they contain other and irrelevant statements they are not set forth herein in full. Relative portions of said statements are as follows:

Two letters from H. O. Parman, a representative of the Company, from Hotel Lincoln, Vincennes, Indiana, dated June 1, 1937, reading as follows:

"Mr. R. R. Adams.

Dear Mr. Adams

On April 24th at the Terre Haute House, Terre Haute Ind., a Mr. Schlumpf, Gen Foods Man from Evansville, approached the writer saying, 'A National Bis. Co. man in Evansville advised me that Kellogg was going to have to take up all Kellogg Shredded Whole Wheat Biscuits, that the Supreme Court had decided against Kellogg Co.' He stated further that the Courts didn't care for Kellogg Co making Whole Wheat Biscuits but they objected to the slogan 'The original has this signature.'

He asked me if we were picking up the retailers stock yet.

Told him I knew nothing about it.

Yours,

H. O. Parman"

"Mr. R. R. Adams

Dear Mr. Adams:

The National Bis Co gave to the Terre Haute Tribune Terre Haute Ind an article entitled, 'National Bis. Co. wins Shredded Wheat Decision.'

They ask them to print this article advising the case was now settled for good.

Mr. Lou Kiefer, National advertising manager for the Terre Haute Tribune refused to print the article.

Yours,

H. O. Parman"

A letter from J. J. Casey, a Company representative, from Hudson Falls, New York, reading as follows:

"Dear Mr. Prosser:

Friday while in a Grand Union Store in Hudson Falls, I overheard the Asst Supt, a Mr. R. T. Parry, instruct his manager to clear up our s. w. Biscuits at 10¢. On questioning him found that a member of N. B. C. had shown him a letter which led him to believe they (N. B. C.) had won their case.

On my telling Mr. Parry the true state of affairs he became infuriated and asked that a copy of my letter be mailed him so that he could take the representative of N. B. C. to task for his design in trying to misrepresent the facts. Mr. Parry informed me, he believed the N. B. C. story to such an extent he had instructed his managers to clear up at once.

Of course he wouldn't give me the name of the N. B. C. representative. From Mr. Parry, I gathered the N. B. C. outfit were using that method to further their cause and if it has not already been done, it may be a good idea for Battle Creek to forward a copy of the letter to all the chain and large operators.

Mr. Parry's address is:

R. J. Parry
150 Glen St.
Glen Falls, N. Y.

Very truly,
J. J. Casey"

A letter from Mr. Yarnell, a company representative, dated May 15, 1937, from Hotel Berry, Athens, Ohio, reading as follows:

"Mr. Champion

I ran into 3 stores in Athens yesterday where a Mr. Warren of the Natl. Bis. Co. had told the grocers we would not make 324s (shredded wheat biscuit) anymore and the jobbers were unloading what little they had on hand. I have one grocer

Mr. B. Banghouse who promised me he would back up the statement any time in the future. Also the N. B. Co. had forced Kellogg's to quit making it, 324s.

Yarnell

P. S. I told Francis what they were doing."

A letter from R. B. Roll, a company representative, from Pittsburgh office of defendant-appellee, dated May 14, 1937, together with a letter of transmittal thereof from the Pittsburgh branch, reading as follows:

"Dear Mr. Berry:

The National Biscuit Office and salesmen are making it plenty tough to get repeats and new placements of our Biscuit.

They have requested the Co-operative Groups to warn their members to discontinue our Shredded Wheat Biscuit as they also are subject to the terms of the verdict.

I tried to get a letter from the Quality Service Office but without any luck.

Yours very truly,
R. B. ROLL, JR."

"5-18-37

Dear Mr. Swan:

Please note the attached letter which we believe is self-explanatory.

Don't you feel it would be advisable to have just a short note from the Home Office to the effect that we will be responsible for any damage caused our customers as a result of the National Biscuit Company's action.

In other words, you have already sent each one of our men a letter covering the entire transaction, but this type of a letter would not be easy to show to many people as it would take too long to read.

I have heard several comments from our men in the field to the effect that the National Biscuit Company is and has been trying to intimidate some of the trade as a result of this recent verdict.

PITTSBURGH OFFICE."

A letter from H. R. Conillers, a company representative, from Cookeville, Tennessee, dated May 26, 1937, reading as follows:

"Mr. J. F. Barnett
Kellogg Sales Co.
Memphis, Tenn.

Dear Sir:

On calling at the Ideal Gro. Cookeville, Tenn. I ran into a situation pertaining to our shredded wheat that may cause us salesmen some trouble in the near future. The buyer has handled and featured Kellogg Shredded Wheat for some months now and has not stocked National Biscuit shredded wheat during that time. I found the National Biscuit product on the shelf this week and asked if he was not letting me down, he had this to say;

'The National Biscuit man told me that Kellogg had been made to stop selling shredded wheat and all there was left for me to do was to stock his product.'

This man was sincere when he told me this and I think it should be called to the attention of the trade at every opportunity that Kellogg is still making it and selling it.

Yours truly

H. R. Conillers"

A letter from O. K. Berry, district sales manager, from Pittsburgh, Pennsylvania, dated June 7, 1937, reading as follows:

"Mr. Crichton Clarke
36 West 44th Street
New York, N. Y.

Dear Mr. Clarke:

We are advised by our salesman, Mr. (E. J. McGrade, that Mr. Wm. Howe, of the New Castle Grocery Company, New Castle, Pa., is discontinuing handling Kellogg's WHOLE WHEAT BISCUITS as he is afraid of being sued by the National Biscuit Company.

Mr. Howe would not commit himself as to who advised him regarding BISCUIT, but we do know that a letter went out from the Fairlawn Stores' Headquarters regarding the suit. Copy of this bulletin was sent to Battle Creek sometime ago and is, undoubtedly, in your hands at the present time. We do not know whether Mr. Howe threw out the BISCUITS as a result of this bulletin or not.

Yours very truly,

KELLOGG SALES COMPANY

O. K. Berry,
District Sales Manager"

A letter from O. K. Berry, district sales manager of defendant-appellee, from Pittsburgh, Pennsylvania, dated June 7, 1937, reading as follows:

"Mr. Crichton Clarke
36 West 44th Street
New York, N. Y.

Dear Mr. Clarke:

Mr. W. S. Kuhn, our Uniontown representative, advises that the man in charge of National Biscuit Company's sales in the Uniontown area addressed the United Quality Food Stores' repre-

sentatives, which consists of 30 or 35 retailers, and stated that Kellogg was no longer permitted to make and sell Kellogg's SHREDDED WHOLE WHEAT BISCUITS.

We were unable to get anything on this in writing, but were advised by two of the members that this was the information given them at their meeting.

Yours very truly,

KELLOGG SALES COMPANY

O. K. Berry

District Sales Manager."

Exhibit A is a copy of an issue of the "Kansas Grocer," which is a trade paper circulated throughout the retail trade, and which contains an abbreviated and prejudicial excerpt from the decision of this Court.

Attached hereto and marked Exhibit B and B-1 are two letters received by our representatives in retail stores. Exhibit B in Norfolk, Virginia and Exhibit B-1 in New York City. These letters are sent out by Seeman Brothers, Inc., purchasing agents for National Biscuit Company, to the retail trade, in which it appears that the trade received broadcast these letters stating that the Kellogg Company has been enjoined from the use of the name "shredded wheat" in advertising and in offering this product for sale, by reference to the decision of this Court. Such decision is tied up in the same letter with the proposed "tremendous 1937 shredded wheat sales and advertising drive, the greatest in the history of this famous product. Leading newspapers and magazines will present a constant reminder." Such publicity indicates an attempt on the part of the National Biscuit Company to indicate to the trade that the newspaper and magazine publicity resulting from this decision will present a "constant reminder" of that company's "tremendous 1937 shredded wheat sale and advertising

drive, the greatest in the history of this famous product."

Exhibit C, likewise attached, is a letter circulated by Francis H. Leggett & Co., of New York City, likewise purchasing agent for the National Biscuit Company, but not otherwise identified or associated with Seeman Brothers, Inc., the apparent authors of Exhibits B and B-1. It is interesting to note that this circular letter from Francis H. Leggett & Co. is identical in wording with that purporting to issue from Seeman Bros., Inc., and any comments with reference to Exhibits B and B-1 are equally applicable to Exhibit C. The identity of information in these two exhibits, of course, irrefutably points to a common authorship and the inference is inescapable that the plan of this circularization lay in the offices of the National Biscuit Company.

Exhibit D is a circular received by our representatives in New York City from local grocers and distributed to them by representatives of the National Biscuit Company, and which contains and is made up of unfair prejudicial excerpts from the decision of this Court.

Exhibit E is a further misleading excerpt from the decision quoting only a few words and published in the June issue of "Food," a publication of San Francisco, California.

A report from J. L. Fischen, a company representative, from Denver, Colorado, dated May 8, 1937, reading as follows:

"National Biscuit Company salesmen asking papers to run special story regarding shredded wheat court decisions. Papers contacted by the writer state they will not publish this story since it reflects against Kellogg's."

A report from T. L. Van Horn, a company representative, from Evansville, Illinois, dated May 15, 1937, reading as follows:

"National shredded wheat salesmen are telling the grocers that we are having to pay them profit on every package we have ever sold of shredded whole wheat biscuit, and make no small story of it."

A report from Robert B. Roll, a company representative, from Cumberland, Maryland, dated May 15, 1937, reading as follows:

"National Biscuit putting pressure on retail outlets by letting them believe they will be subject to fine if they continue stocking our shredded wheat biscuit."

A report from E. T. Van Dyke, a company representative from Bluefield, West Virginia, dated May 29, 1937, reading as follows:

"Find National Biscuit Co. salesmen informing the trade that Kellogg Co., by court order, cannot continue to make or sell Kellogg's whole wheat biscuit. They (N. B. C.) are trying to give us the black eye by saying to the trade that 'Kellogg stole every patent he has.' Stop this talk is hurting us with the trade."

A report from A. M. Erstad, a company representative, from Aberdeen, Tennessee, dated May 15, 1937, reading as follows:

"National Biscuit Co. salesman is showing a letter from his Company to jobbers and trade stating that Kellogg is out of the biscuit business. Unable to get signed statement to that effect from trade."

A report from G. W. Wood, a company representative, from Rocky Mount, Virginia, dated May 22, 1937, reading as follows:

"Heard a merchant in a store in Smithfield to make a remark that he had been told that we would have to stop making shredded wheat biscuits. I asked him where he had got the information from. He would not tell me the name of the person who told him this, but he did say 'why you should know.'"

A report from C. P. Harnden, a company representative, from Seattle, Washington, dated May 15, 1937, reading as follows:

"Shredded wheat decision has caused considerable comment from advertising groups. They are given to understand that we will probably discontinue making this product and no more would be available as soon as we cleaned up our present supply."

A report from R. H. Taylor, a company representative, from Rome, Georgia, dated May 22, 1937, reading as follows:

"Notice N. B. Co. is doing a good bit of sampling of their shredded wheat, and informing the trade we will have to discontinue our products on account of the Court ruling recently."

A report from M. F. Stinnett, a company representative, from Lancaster, Pennsylvania, dated May 22, 1937, reading as follows:

"National Biscuit Co. certainly did make sure that the trade knows about their winning the decision in the Supreme Court recently. Quite a bit of the trade wants to know if it is to be discontinued."

A report from W. A. Spencer, a company representative, from Salina, Kansas, dated May 8, 1937, reading as follows:

"National Biscuit Company or someone circulating the rumor Kellogg will have to quit making the shredded wheat biscuit."

A report from Ora Brumbelou, a company representative, from Jackson, Mississippi, dated May 1, 1937, reading as follows:

"In Meridian National Biscuit Company is showing a clipping and telling trade Kellogg cannot make or use the word 'shredded' any more. Also stating that Kellogg was not going to make shredded whole wheat biscuit."

A report from G. Sheret, a company representative, from Portland, Oregon, dated May 1, 1937, reading as follows:

"National Biscuit Company salesmen are out telling their trade about their recent winning decision in the Shredded Wheat-Kellogg Co. issue in the court. What will Kellogg do now? That is what the Biscuit Co. salesmen are asking the grocers."

A report from R. D. Gates, a company representative, from Ohio, dated May 1, 1937, reading as follows:

"National Biscuit Company salesmen are telling the grocers that our whole wheat biscuit will be immediately discontinued and to date with one story on top of another the whole thing has created quite a lot of unnecessary talk among the trade."

A report from J. H. Maize, a company representative, from Poplar Bluff, Missouri, dated May 1, 1937, reading as follows:

"Our competitors National Biscuits are telling both the retailer and jobbers that we will be forced to remove our shredded wheat biscuit from the markets."

A report from W. P. Emerson, a company representative, from Boston, Massachusetts, dated May 8, 1937, reading as follows:

"National Biscuit Company salesmen are spreading the report in retail stores that the Supreme Court has decided in their favor regarding their action against Kellogg Company over shredded wheat and that we must now take the product off the market."

A report from Peter B. James, a company representative, from Brockton, Massachusetts, dated April 24, 1937, reading as follows:

"National Biscuit Company local mfg immediately on word of the reversed decision on shredded wheat has contacted the larger outlets in Brockton requesting them to remove Kellogg's shredded wheat biscuit from the shelves claiming the same illegal. Inasmuch as these outlets are well stocked and don't care to be dictated to, the request was ignored. N. B. C. in this area has in its questionnaire the distribution of Kellogg's shredded wheat in each saleman's territory."

A report from C. A. Birk, a company representative, from Decatur, Illinois, dated April 24, 1937, reading as follows:

"National Biscuit salesmen are carrying a letter from the St. Louis office and showing it to all retailers where the Court had reversed the decision in favor of their company. In regard to shredded wheat and Kellogg would not manufacture no more biscuits."

A report from Cyril C. Higg, a company representative, from Los Angeles, California, dated April 24, 1937, reading as follows:

"Very unfavorable news story appearing in trade magazines regarding reversion of the decision in the case of National Biscuit Co. against Kellogg Co."

A report from L. R. Hartzen, a company representative, dated April 24, 1937, from Philadelphia, Pennsylvania, reading as follows:

"Men report that the retailers are taking notice of the latest court ruling on shredded wheat, and some men report that N. B. C. salesmen are again active with the retailers putting on pressure to eliminate our biscuits from their stocks."

C. F. BAUMGART.

Subscribed and sworn to before me a notary public in and for the County of Calhoun, State of Michigan, this nineteenth day of June, 1937.

THERESA T. GILLEN,
Notary Public.

My commission expires December 7, 1937.



EXHIBIT "A."

KANSAS GROCER

Official Publication Kansas Food Dealers' Association
Published Monthly—C. M. Sandstrom, Editor and Manager

Independent Trade Merch. U. S. Patent
Office
Established 1888
MEMBER



Editorial and Business Office
514-15-16 Huron Building
Kansas City, Kansas
Advisory Board
FRED MARTINEK I. B. GODFREY
E. A. SCHALKER

A FOOD TRADE MAGAZINE DEVOTED TO THE ADVANCEMENT OF THE INDEPENDENT FOOD DEALER OF KANSAS. OUR IDEAL IS CO-OPERATION, TO CREATE A BETTER UNDERSTANDING OF FAIR TRADE PRINCIPLES.

~~Advertising Rates—Supplied on request—detail rates published in Standard Rate and Data. Forms close 20th of each month prior to publication.~~

New York Representative—Robert Barton, 551 5th Ave. Murray Hill 2-4975, New York City.

Subscription Rates—\$1.00 per year—Club Rate 25c per year—single copy 10c.

Owned and Published by The Retail Grocers' Association of Kansas City, Kansas.

Phone Dillwood 1525

FORTIETH ANNUAL CONVENTION—NATIONAL ASSOCIATION OF RETAIL GROCERS
BOSTON, "THE HISTORIC CITY," JUNE 20, 21, 22, 23, 24, 1937

VOLUME 15

MAY, 1937

No. 7

National Biscuit Company Wins Shredded Wheat Decision
Court Enjoins Kellogg Company From Use of Shredded Wheat in Name, Shape or Form.

Philadelphia, April 12—U. S. Circuit Court of Appeals for the Third Circuit today reversed a former decision in the case of National Biscuit Company vs. Kellogg Company involving the use of the trade name "Shredded Wheat." The court declared that the Kellogg Company employed "unfair competition and untruthful statements to deceive the public and secure the trade which in equity and good conscience belonged to the plaintiff."

Following is an excerpt from Judge J. Warren Davis' opinion:

"The defendant (Kellogg Company) appropriated not only the name of the plaintiff's product (Shredded Wheat); but also its form and shape which has characterized the biscuit for more than forty years."

"In order to secure the property of the plaintiff in the name and form of its product, the defendant placed upon its cartons the words, 'The original has this signature: W. K. Kellogg.' That is, defendant not only adopted the name and form of plaintiff's product, but also claimed that its product was the ORIGINAL and by implication that the plaintiff's was an IMITATION. There could have been but one object for doing this, and that was by unfair competition and untruthful statements, to deceive the public and secure the trade which in equity and good conscience belonged to the plaintiff."

"... a decree will be entered vacating our former decree and reversing the decree of the District Court with directions to the court to enter a decree en-

joining the defendant (Kellogg Co.) from the use of the name 'Shredded Wheat' as its trade name and from advertising or offering for sale its product in the form and shape of plaintiff's biscuit in violation of its trademark; and with further directions to order an accounting for damages and profits."

"Shredded Wheat" a product of the National Biscuit Company has been manufactured at Niagara Falls, N. Y., since 1900.

"Maine Grocer, 83, Talks to President"

(From "New York Times," April 1, 1937)

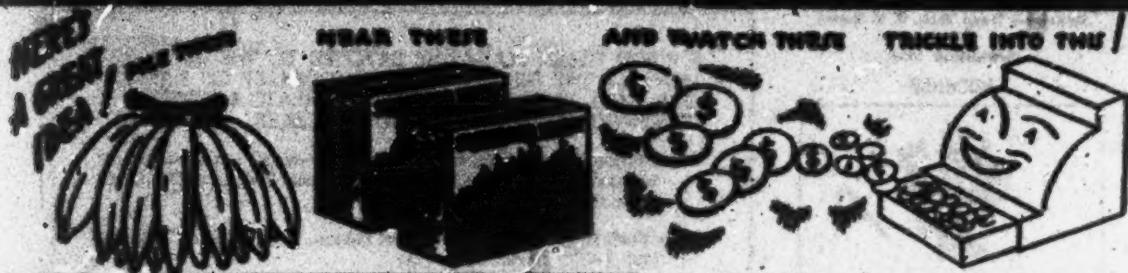
For nearly fifteen minutes today President Roosevelt listened to and swapped stories with Albert A. Cole, aged 83, who for more than seventy-three years has been a store-keeper at South Portland, Maine, and is one of the country's oldest active merchants.

Mr. Cole, who was accompanied by Representative Oliver of Maine and representatives of the National Retail Grocers' Association, told Mr. Roosevelt of the days "when men done the trading" and when the open cracker barrel, brown sugar and pickles, plus a long bench and a fat, red-hot stove, always assured a quorum of men in his community.

But things have changed, he told the President, and only the cold winter days and nights are left to bring back memories of the old days. He is a Republican, but he did not discuss politics with the President.

Photographers fired flashlight bulbs as he left the Executive Office, but the storekeeper did not flinch. He appeared more interested in a white magnolia tree in full bloom and a crowd of visitors who looked on at the scene.

The Kansas Grocer

EXHIBIT "B."**TODAY'S OVER THE COUNTER TIPS**IMPORTANT COURT DECISION.**To Triangle Store Members:**

The U. S. Circuit Court of Appeals has handed down an important decision in the case of National Biscuit Company vs Kellogg Company, enjoining the Kellogg Company from the use of the name "SHREDDED WHEAT" in advertising, and from offering for sale its product in the form and shape of N. B. C. Shredded Wheat.

"SHREDDED WHEAT", a product of National Biscuit Company, has been manufactured at Niagara Falls since 1900.

We suggest that you take advantage of the tremendous 1937 "SHREDDED WHEAT" Sales and Advertising drive, the greatest in the history of this famous product. Leading Newspapers and Magazines will present a constant reminder.

Tie-up your store by arranging prominent displays of Shredded Wheat with seasonal fruits such as bananas, peaches, strawberries, etc.

The N.B.C. Salesman will be glad to assist and supply you with attractive timely store display material - Ask him.

SHERMAN BROTHERS, INC.

May 3, 1937

EXHIBIT "B-1"

TODAY'S "OVER THE COUNTER" TIPS

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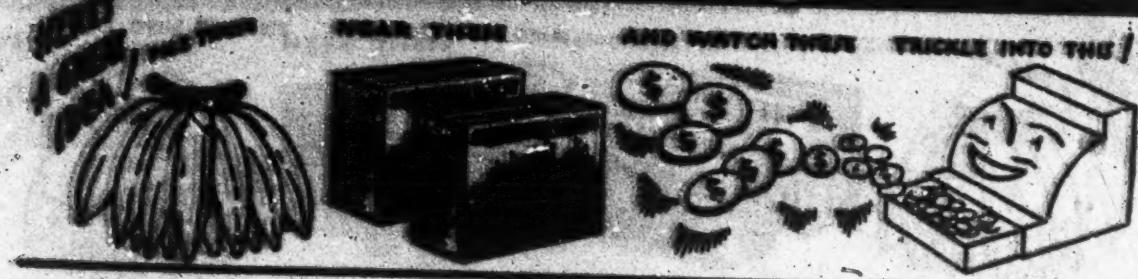
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SEEMAN BROTHERS, INC.

May 3, 1937

TODAY'S "OVER THE COUNTER" TIPS



N. Y., 4/29/37

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PREMIER STORES,
Francis H. Leggett & Co.

EXHIBIT "D."

FOR IMMEDIATE RELEASE

NATIONAL BISCUIT COMPANY
WINS SHREDDED WHEAT DECISION
Court Enjoins Kellogg Company from Use
of Shredded Wheat in Name, Shape or Form.

PHILADELPHIA: April 12: U.S. Circuit Court of Appeals for the Third Circuit today reversed a former decision in the case of National Biscuit Company vs. Kellogg Company involving the use of the trade name "Shredded Wheat". The court declared that the Kellogg Company employed "unfair competition and untruthful statements to deceive the public and secure the trade which in equity and good conscience belonged to the plaintiff."

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"In order to secure the property of the plaintiff in the name and form of its product, the defendant placed upon its cartons the words, 'The original has this signature: W. K. Kellogg'. That is, defendant not only adopted the name and form of plaintiff's product, but also claimed that its product was the original and by implication that the plaintiff's was an imitation. There could have been but one object for doing this, and that was by unfair competition and untruthful statements, to deceive the public and secure the trade which in equity and good conscience belonged to the plaintiff.

". . . a decree will be entered vacating our former decree and reversing the decree of the District Court with directions to the court to enter a decree enjoining the defendant (Kellogg Co.) from the use of the name "Shredded Wheat" as its trade name and from advertising or offering for sale its product in the form and shape of plaintiff's biscuit in violation of its trademark; and with further directions to order an accounting for damage and profits."

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From the Wide

FIELD of FOOD

Products . . . Packages . . . Advertising . . . Displays . . . Expansions . . . Reports . . . News of the Trade

Shredded Wheat Decision

The United States Circuit Court of Appeals, reversing a former decision in the case of National Biscuit Company vs. Kellogg Company, ruled that the Kellogg Company had infringed upon the rights of National Biscuit Company in marketing Whole Wheat Biscuits with a subtitle "shredded wheat" and the note "the original has this signature: W. K. Kellogg."

National Biscuit Company had manufactured Shredded Wheat since 1900, its patents expiring in 1912.

In reversing the former decision, the court said: "When a person after the expiration of a patent has spent such enormous sums of money . . . equity will not permit another to apply the name of the merchandise to his product."

Root Beer Distributed Direct

Charles E. Hires Company, manufacturer of root beer which in the past has been sold in extract form to licensed bottlers, has begun national distribution direct to the dealer.

Norman Bel Geddes, famous artist, has redesigned the Hires bottles in 12- and 16-ounce sizes, and a national advertising campaign, using 150 newspapers in 100 cities will promote the plan.

New Juices Introduced

Richmond Chase Company, California canning firm headquartered at San Jose and operator of canning plants at San Jose, Stockton and Mountain View for its R-C and Heart's Delight brands, is adding three new fruit juices to its line. The new products, all packed in tin, will be marketed under the names of Plum Nectar, Pear Nectar and Peach Nectar.

Coca Cola Reports Gain

The Coca Cola Company and subsidiaries in their annual report for the year 1936 show a net profit of \$20,398,078. This compares with a profit of \$15,804,256 in 1935.

Remedy for Frost

Col. Charles H. Rutherford, Phoenix attorney, has invented a process for "washing away frost" from fruits and vegetables. The patent is based upon spraying the fruit and vegetables with chemicals after a frost and before the sun thaws them.

FIELD of FOOD

Grocery Distributors Association of Northern California is a newly formed organization of wholesale grocers, chain stores and co-operatives in Northern California, organized to promote the common interests of its members and of the grocery industry in general.

Officers are: President, A. J. Falk; S. & W. Pine Foods, Inc.; Vice-Presidents, K. W. Hess, Safeway Stores, Inc., and E. F. Schonfeld, Sun Francisco Grocery Co., Ltd. Other directors are: A. A. Traverso, V. Traverso Co.; W. D. Lenzky, Louis T. Snow & Co.; Harvey Sorenson, United Grocers, Inc.; R. S. Grunseid, G. Grunseid & Sons; J. P. Paigh, Oakland Wholesale Grocery Co.; F. A. Russin, Western States Grocery Co.; E. G. Williams as Secretary-treasurer with headquarters at 444 Market Street, San Francisco.

Report Favors Patman Law

Carroll & Polz, Inc., New York City, has issued a 48-page report of the results of a survey to determine the attitude of the grocery industry toward the Robinson-Patman act, conducted for the Associated Grocery Manufacturers of America.

The report summarizes the replies of 146 grocery manufacturers, 239 distributors and 196 retailers. All three groups expressed opposition to secret rebates, unearned quantity discounts, excessive advertising allowances and inequality of competing buyers. More than 70 per cent favored the intent of the Robinson-Patman law. More than 80 per cent favored legislative action to eliminate loss-leader selling, but only 45 per cent favored mark-up laws.

New Chocolate Drink

Kraft-Phenix Cheese Corporation is marketing Kraftstone, a new chocolate-flavored food drink.

Gerber Adds Liver Soup
Newest addition to the line of Gerber's strained foods for babies is liver soup, consisting of vegetables and beef liver cooked and strained in such a manner as to preserve vitamins and minerals.

A. M. A. Approves Milk

The packer of Sunny Skies brand evaporated milk has announced that the brand has been accepted by the Council on Foods of the American Medical Association. The seal of the council's acceptance will shortly appear on all Sunny Skies milk labels.

EXHIBIT "E."

Fruit baskets in Stever's Stratus Market Company are a patent source of extra profits. This downtown market specializes in the sale of fruit baskets ranging in price from \$2 to \$50, and has established an arrangement with grocers in the leading cities of the United States and Great Britain for receiving constant handling orders on a telegraph basis. The merchandising of the fruit basket service receives constant attention. The window regularly features this service, a neon sign calls attention to it and direct mail and telephone contacts continually publicize it.

Here's what I've been reading

Only trouble with getting a reputation is, you have to live up to it... and that goes for the quality of the scissors-work below, too. Wonder why I started this? JOE HARRISON

Turnstile Editor

Somebody else can have my can—J.S.H.

Keep Meant Inventory

Retailers should take a complete meat inventory and figure meat department results at least every four weeks. If help stores do this, Armur's Volunteer Group Department has worked out a form which saves time for the retailer and enables him to put his finger on the meat department problem without guesswork. This will help retailers plug the leaks and bolster up the weak spots.

—H. G. P. Bullock.

We're sending Armour's a bill for about free publicity—J.S.H.

How to Sell Produce

Many fresh produce stores run by Italians and Greeks show that their owners know far more about handling produce than does the ordinary grocer. They excel in three points: They buy produce much more carefully, holding down quantities in order to make quick turnover and keep their goods fresh. They closely watch the condition of every item in their stock, picking over and rearranging so that riper and more perishable goods move out. Last, at any time of the day fresh fruit and vegetable displays in these stores look good—they do not have the ragged look of displays in many retail grocery stores after the morning rush.

—Grocers Commercial Bulletin.

Cooking In the Dark

Miss Gretta Griffis is the world's only blind cooking school demonstrator. Miss Griffis was born blind and was reared in El Dorado, Kans. A graduate of McPherson college, she later entered the University of Chicago where she received a master's degree in psychology.

Returning to her home, she told her parents that she wished to learn to cook, since she was ambitious to become an efficient home-maker. Fearing to give her the use of an open-flame burner, her father purchased a Hotpoint electric range. Soon her fame as a cook spread through her home town.

The manager in charge of the Edison General Electric appliance store in El Dorado heard about her and one day got a bright idea. Dealers and salesmen were coming into El Dorado for a sales meeting and he asked her to show them how easy it was for a blind girl to cook on a Hotpoint range.

She readily agreed and her career was launched. Other Hotpoint sales executives sought her services and, not long ago, the main office executive in Chicago sent for her. She has developed a precise routine, has been made the "star" of a specially prepared sound film, to be shown all over the country, and is now out on the road making personal appearances.

Her first tour started in Vermont and took in a considerable number of eastern points. Besides emphasizing the ease and safety of electric cooking, she has opened up a new field. Electric ranges have been going into the homes of the blind, in surprising numbers. A representative of SAI talked with her and she said:

"Cooking is not very difficult for me. I can feel the hands of the clock. I can feel the notches on the heating gadgets. I can tell when to turn a pancake by the sound of the sizzling. I can bake a swell angel food cake. Audiences fussed me up a bit at first but, I've gotten over that. I enjoy my work immensely. It's great fun."

—Sales Management.

How Fruits Rate in Food Value

The chart below, from "Consumer's Guide," publication of the Agricultural Adjustment Administration, gives information that can be a source of ideas for fruit ads, window and store signs.

** Excellent; ** Good; * Fair

	Vitamins	A	B	C	G	Cal-	Iron	Fuel Value per Pound (Gardens)
Apples (fresh)	290
Apricots (fresh)	**	**	**	**	**	**	**	255
Apricots (dried)	1,260
Bananas	443
Blackberries (or dewberries)	245
Blueberries (or buckberries)	310
Cantaloupe (see Muskmelon)	**	**	**	**	**	**	310
Cherries	240
Cranberries (fresh)	275
Currants (dried—see Raisins)	1,190

Only trouble with getting a reputation is, you have to live up to it... and that goes for the quality of the scissors-work below, too. Wonder why I started this? JOE HARRISON

Turnstile Editor

They Sold the Market Short

Florida canners of grapefruit segments and juice can testify that recent suggestions from the Food Institute should be heeded by packers of fruits and vegetables and by distributors of canned goods. We have been telling packers to be cautious in selling short on 1937 packs; telling buyers to conservatively cover ahead when they can get contracts from dependable companies at prices that seem reasonable. Both suggestions are based on the outlook for business and what is likely to happen to consumption and prices under the influence of inflation, the stronger fair juice market looked particularly bad because Texas Federal Government.

Five months ago, grapefruit seemed headed for bargain prices. Canners figured that they would secure all the fruit they needed for little more than the cost of picking and delivering.

Both suggestions are based on the first large crop of grapefruit. These conditions caused canners to break several million cases of grapefruit hearts and juice at bargain prices, selling the market short against production exerted during January, February and March.

But these canners failed to anticipate the buying of fresh grapefruit by the Federal Government, the record consumption of fresh grapefruit; and the California freeze which brought higher levels for all citrus fruits.

Now Florida canners are paying about twice as much as they expected for fruit. Some free selling packers are short on their early contracts and are sinking cash settlements with buyers, where they carried contracts guaranteeing any amount of delivery.

Largest pack of grapefruit and juice in history is going to consumption with a rush. Prices have salvaged rapidly and may advance more during the summer, when grapefruit and juice are likely to sell well because of citrus fruits being high priced.

This is rather startling support for the following business rules to be followed during the canned goods season for 1937, starting now and running until 1937 packs are ready:

"Canners should protect regular customers by selling under market conditions as they existed but must watch their step when they sell too rapidly.

"Distributors will use money, as an average, if they fail to conservatively cover ahead on the size and grades which are the backbone of their business."

"These common sense business rules for 1937 apply to every important commodity offered at prices in line with previous levels for that commodity and with the general price level for foods."

Canned vegetables may be over-produced in some sizes and in some grades. Nobody can be certain about any crop until farmers are well along in their planting. Nobody can be sure about any harvest until the weather finishes its work of producing the tonnage.

But even with canned vegetables, it is probable that packers will have difficulty securing large supplies unless they get into such a speculative frenzy that they advance their buying offer to levels which will loosen the present resistance from farmers.

With canned fruits and fish, the situation is tighter. Fruit producing plant is limited. Outlook for fresh fruit markets has been strengthened by considerable damage to peach crops in the South Atlantic states.

"Take canned pears as an example: Present trading prices, from the Pacific Coast are within about 15 per cent of the bottom during the worst part of the depression.

Canners are unloading inventories at bargain prices in preparation of the feature selling of canned pears from retail stores during April and again in June.

Pears sell in large volume whenever they are aggressively offered. One medium sized chain is actually selling more pears than peaches because it has promoted pears for several years.

Forceful merchandising of pears by chains and independent dealers should sell a lot of pears and open increased consuming demand for the new pears.

Special promoting is part of the plan by the pear growers to collect higher prices for their fresh fruit.

"The answer is to be found in the way competition operates and the tendency of men to think of the future from their recollections of what has happened in the past."

Canned pear prices have had recurring weak spots

EXHIBIT

Returning to her home she told her parents that she wished to learn to cook, since she was ambitious to become an efficient home-maker. Fearing to give her the use of an open-flame burner, her father purchased a Hotpoint electric range. Soon her fame as a cook spread through her home town.

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Her first tour started in Vermont and took in a considerable number of eastern points. Besides emphasizing the ease and safety of electric cooking, she has opened up a new field. Electric ranges have been going into the homes of the blind, in surprising numbers. A representative of SM talked with her and she said:

"Cooking is not very difficult for me. I can feel the hands of the clock. I can feel the noches on the heating gadgets. I can tell when to turn a pancake by the sound of the sizzling. I can bake a swell angel food cake. Audiences fussed me up a bit at first but I've gotten over that. I enjoy my work immensely. It's great fun."

Sales Management.

Plan National Brand Drive

Evidence that the increased sale of private brands is a matter of growing concern to the producers of nationally advertised products was afforded last week by the trial balloon announcement, issued by Paul Willis of the Associated Grocery Manufacturers of America, which outlined a vigorous program of consumer education. His proposal for marking advertised goods with a label guaranteeing their quality has been enthusiastically received not only in the grocery trade but in drugs and cosmetics as well.

—Business Week.

... Pepto Wiggles Relaxes in National Brands but only as long as they will on sight . . . so help to it. A.G.M.A.—J.S.H.

National Biscuit Wins Sale

National Biscuit Co. won a five year old suit against the Kellogg Co. when the United States Circuit Court of Appeals decided that Kellogg was guilty of unfair competition and "untruthful statements" in placing on its "Whole Wheat Biscuit" carton, the famous Kellogg slogan, "The original has this signature." Kellogg was enjoined from using either the name or the shape of Shredded Wheat and was ordered to account for damages and profits.

—Rewritten from Business Week.

How Fruits Rate in Food Value

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... Excellent; ** Good; * Fair

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	A	B	C				
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Apricots (Food)	•	•	•	•	•	•	•
Avocados (Food)	•	•	•	•	•	•	•
Bananas (Food)	•	•	•	•	•	•	•
Blackberries (or dewberries) (Food)	•	•	•	•	•	•	•
Blueberries (or huckleberries) (Food)	•	•	•	•	•	•	•
Cantaloupe (Food)	•	•	•	•	•	•	•
Cherries (Food)	•	•	•	•	•	•	•
Citrus fruits (Food)	•	•	•	•	•	•	•
Coconut (Food)	•	•	•	•	•	•	•
Dates (Food)	•	•	•	•	•	•	•
Grapes (Food)	•	•	•	•	•	•	•
Guava (Food)	•	•	•	•	•	•	•
Kiwifruit (Food)	•	•	•	•	•	•	•
Lemons (Food)	•	•	•	•	•	•	•
Limes (Food)	•	•	•	•	•	•	•
Mango (Food)	•	•	•	•	•	•	•
Oranges (Food)	•	•	•	•	•	•	•
Peaches (Food)	•	•	•	•	•	•	•
Pears (Food)	•	•	•	•	•	•	•
Plums (Food)	•	•	•	•	•	•	•
Raspberries (Food)	•	•	•	•	•	•	•
Strawberries (Food)	•	•	•	•	•	•	•
Tangerines (Food)	•	•	•	•	•	•	•
Watermelons (Food)	•	•	•	•	•	•	•

Evidence that the increased sale of private brands is a matter of growing concern to the producers of nationally advertised products was afforded last week by the trial balloon announcement, issued by Paul Willis of the Associated Grocery Manufacturers of America, which outlined a vigorous program of consumer education. His proposal for marking advertised goods with a label guaranteeing their quality has been enthusiastically received not only in the grocery trade but in drugs and cosmetics as well.

—Business Week.

... Pepto Wiggles Relaxes in National Brands but only as long as they will on sight . . . so help to it. A.G.M.A.—J.S.H.

jacks are ready;

"Canners should protect regular customers by selling under market conditions as they existed last month when they sell too rapidly. Distributors will lose money as an average; if they fail to conservatively cover ahead on the size and grades which are the backbone of their business."

"These common sense business rules for 1937 apply to every important commodity offered at prices in line with previous levels for that commodity and with the general price level for foods."

Canned vegetables may be over-produced in some sizes and in some grades. Nobody can be certain about any crop until farmers are well along in their planting. Nobody can be sure about any harvest until the weather finishes its work of producing the tonnage.

But even with canned vegetables, it is probable that packers will have difficulty securing large supplies unless they get into such a speculative frenzy that they advance their buying offer to levels which will loosen the present restraint from farmers.

With canned fruits and fish, the situation is tighter. Fruit producing plant limited. Outlook for fresh fruit markets has been strengthened by considerable damage to peach crops in the South Atlantic states.

"Take canned peaches as an example: Present trading prices from the Pacific Coast are within about 15 per cent of the bottom during the worst part of the depression."

Canners are building inventories at bargain prices in preparation of the feature selling of canned peaches from retail stores during April and again in June.

Pears sell in large volume whenever they are aggressively offered. One medium sized chain is actually selling more pears than peaches because it has promoted years for several years.

Forceful merchandising of pears by chains and independents should sell a lot of pears and open increased consuming demand for the new pears.

Special promotion is part of the plan by the pear growers to collect higher prices for their fresh fruit. Government is assisting them. It will continue the control over shipments that maintained fresh pear prices last season. Export sales of fresh pears are to be substantially increased.

Canned pear prices have had recurring weak spots this year, reflecting weakness in other fruits but primarily because pears haven't had a well developed volume movement to consumers.

Both these influences are not likely to be strengthening pear prices during the next 18 months. Few fruits and most distributors are failing to cover liberally.

The answer is to be found in the way competition operates and the tendency of men to think of the future from their recollections of what has happened in the past.

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The answer is to be found in the way competition operates and the tendency of men to think of the future from their recollections of what has happened in the past.

Only other "fair trade" food manufacturers in the state consist of Hormel's soups and canned meat items, Ovaltine, Canada Dry products, two or three specialty condiments, and a few dog foods.

—Rewritten from Business Week.

California Tries Food Price Control Plan

The food industry eyes current experiment in California wherein major distributors of mayonnaise are establishing price contracts with retailers under provisions of the State's fair trade law.

Unlike drug and liquor manufacturers, food producers are hesitant about issuing resale price contracts. Reasons: voluntary and chain groups handle two to three times as great a percentage of the total volume in grocery field as they do in drug. Chains, responsible for 75 per cent to as strong cut-price pressure as drug chains, are less friendly to price maintenance. Worse, if they dislodge either price-level or profit-margin, they can switch to private brands more easily than can be done in other fields.

The "big three" in mayonnaise (Best Foods, Durkee, Kraft-Pheats) are proceeding cautiously in California. None, as manufacturers, have made price agreements. Best Foods and Durkee have worked through distributors. Kraft-Phenix have made no move but are expected to follow the others.

Only other "fair trade" food manufacturers in the state consist of Hormel's soups and canned meat items, Ovaltine, Canada Dry products, two or three specialty condiments, and a few dog foods.

—Rewritten from Business Week.



AFFIDAVIT OF CRICHTON CLARKE.

(Filed July 1, 1937.)

IN THE UNITED STATES CIRCUIT COURT OF APPEALS,
FOR THE THIRD CIRCUIT.

No. 5801. October Term, 1936.

National Biscuit Company,
Plaintiff-Appellant,
against
Kellogg Company,
Defendant-Appellee.

STATE OF NEW YORK, } ss.:
COUNTY OF NEW YORK,

CRICHTON CLARKE, being duly sworn, deposes and says:

I am counsel for the defendant-appellee, the Kellogg Company, in the above-entitled proceeding and counsel upon this application, which is made for an order enjoining the plaintiff-appellant from using the interlocutory decision of this Court, granted on rehearing, as a means of spreading publicity in favor of its product at the expense of the defendant, and to recall said decision by reason of such unfair publicity and propaganda. There is now pending before this Court an application for rehearing of the said decision which is as yet undecided.

On the seventeenth day of May, 1937, when this motion originally came on to be heard, it was adjourned at the direction of Judge Buffington, then presiding, in order that it might come before the Court as constituted upon the hearing of the appeal and for that purpose was adjourned without date until such

time as the Court as so constituted might be sitting. Upon my request it was further directed by Judge Buffington that pending such hearing, counsel might submit supplemental or additional affidavits setting forth additional instances of the use of the said decision as an advertising medium or such other facts as might be pertinent upon such application.

On the seventh day of May, 1937, I received a copy of a letter addressed to the Court by counsel for the National Biscuit Company, appellant, with reference to the application for rehearing, which is annexed hereto and marked Exhibit "A." I respectfully ask the Court to note that on page 2 of the said letter, counsel for National Biscuit Company repeats its concession of the right of appellee to make the biscuit in issue in substantially the form or shape used provided that each biscuit be marked with a distinctive mark. Subsequent to the receipt of this letter, I addressed a letter to the Court, sending a copy to counsel for National Biscuit Company, which is annexed hereto and marked Exhibit "B," and asked the Court to note that in this letter we drew attention to the fact that we had distinctively marked each biscuit, by enclosing in a sealed and distinctively marked carton and by making each one shorter and of different dimensions, than those of the plaintiff. It is pointed out in such letter that plaintiff actually thereafter copied the biscuit which Kellogg Company had made as to size and thereby voided the distinction which defendant had voluntarily adopted. In spite of the fact that this is so clearly pointed out in such correspondence, there has been no reply to this statement by counsel for the National Biscuit Company.

We are submitting herewith an affidavit of C. F. Baumgart, general sales manager of Kellogg Company, sworn to on the nineteenth day of June, 1937.

This affidavit refers to many instances which have come to his notice concerning statements made by salesmen for the National Biscuit Company and claims made by them with reference to the force and effect of the interlocutory decision of this Court granted upon rehearing and their attempts to use the same as an unfair sales argument. Said affidavits also contain a large number of press releases and clippings from press and trade journals, which it is alleged were released by publicity agents for the said National Biscuit Company.

Subsequent to the making of this affidavit, I have received from the Kellogg Company from its various sales offices throughout the country and likewise from many press clipping bureaus, a large number of such press releases and also copies of further statements made by salesmen. Copies of these press releases and statements are annexed and originals will be exhibited to the Court upon subsequent hearing.

Specifically I refer to the following:

A report from R. H. Woodbine, directed to the Denver office, reading as follows:

"Denver Office

June 1, 1937

I was unable to sell Mr. Helge any biscuits this trip because a week ago a National Biscuit Company man was in and told him Kellogg's was going to have to pay them \$4,000,000, and discontinue making the biscuits.

On account of this information he placed his order for biscuits this trip through National.

Was unable to find out if this was an Idaho or Montana salesman. . . .

R. H. Woodbine"

A report received at the office of the district sales manager at Memphis, Tennessee, from Ora Brunbelou,

representative in Southern Mississippi, reading as follows:

"Hotel Parks
Louisville, Miss.

June 12, 1937

While in Kosciusky today Mr. Jim White of City Grocery Store told me M. Hood, salesman for National Biscuit Company of Greenwood Office told him after he sold all the w. w. (whole wheat) biscuits he had in the store he would not get any more as Kellogg was infringing on their rights, using the word shredded, that Kellogg could not use that word again. Mr. White said he had been selling as much of Kellogg's as National Biscuit Co.

Ore Brunbelou"

A report from M. Krumdieck, of Philadelphia, Pennsylvania, dated May 24, 1937, reading as follows:

"Monday, 4/1937

While working in Wilmington I encountered Nabisco (National Biscuit Company) salesman at the Haldas Store, 5th and King Streets, when he saw me displaying the two cases, 324's (shredded wheat biscuit) I had sold them, he came over to me and said in a voice that could be heard all over the store 'I don't see why you people are still trying to sell that imitation (meaning 324's) (shredded wheat biscuit) when the Supreme Court has reversed the decision of the Court in Philadelphia and you will soon have to take it off and pay us \$1,000,000. for damages.

M. Krumdieck"

A letter from Williamsport, Pennsylvania, dated May 15, 1937, directed to the sales representative for that district, reading as follows:

"Wenner Hotel
Williamsport, Pa.
May 15, 1937

Mr. Lewis:

The circular letter referred to in the attached letter was picked up in the store of R. C. Rager in Muncy, Pa. The National Biscuit Company salesmen are circulating a lot of reports in this area in reference to the reversed decision in this suit. They have let a great many merchants under the impression that they will be subject to prosecution for handling this product. I have had this question asked me a number of times in the past two or three weeks. In fact some have hesitated in buying the tumbler deal for this reason. However, we have no proof of this statement other than what the merchants tell us. Nevertheless I believe the letter which I forwarded substantiates these remarks."

A report received by the office of National Biscuit Company from its sales representative H. Lorma, reading as follows:

"Lawrenceville, Ill.
June 3, 1937
Mr. R. R. Adams:

Dear Mr. Adams:

On June 2d National Biscuit Company salesman called on J. E. Wesin & Co., Robinson, Illinois. Mr. Wesin states this man, he does not know his name, told him to lay off Kellogg shredded whole wheat biscuit. That the Courts had ordered Kellogg Co. to quit selling this item. Asked Mr. Wesin if he mentioned the reason and he advised the salesman said that the Courts ordered Kellogg Company to stop making biscuits, that it was an infringement on rights of National

Biscuit Company. Asked several (3 grocers) if they knew this man and they did not. They call him Ritz.

H. Lorma"

In addition to the reports to which specific reference has been made, I have in my possession a great collection of newspaper and trade journal clippings, photostatic copies of a small portion of which are annexed and marked Exhibits "C" to "K" inclusive.

Exhibit "C" is a page from The Oregon Merchants' Magazine, a trade journal which runs on one page a partial excerpt from the opinion of this Court together with display advertising for the National Biscuit Company's shredded wheat. The extracts from the Court's opinion, although headed by the statement directly below the display advertising "Herewith we reproduce Judge J. Warren Davis' opinion," is obviously not the opinion, of course, but simply a collection of highly prejudicial excerpts taken therefrom, interlocked with the comments of the plaintiff thereon.

The language of this particular excerpt is identical with many which recur constantly throughout the widespread publicity which has been circulated, as I am informed, by the plaintiff. Its source is to be found in Exhibits "D" and "D-1." "D" is a direction by the plaintiff's advertising department to its district managers directing them to secure in local papers the insertion "for immediate release" of the attached clipping "verbatim." The attached clipping marked "D-1" which is annexed hereto, it will be seen, is identical with this excerpt and identical with Exhibit "E," and also with the excerpts from the following trade journals shown in the annexed exhibits:

Exhibit "F"—"Super Market Merchandising" for May, 1937, "Kansas City Grocer" for May 25, 1937, "West Coast Trade" for May, 1937.

Exhibit "G"—"Butcher & Grocery Clerk Journal" for May, 1937.

Exhibit "H"—"Grocers' Commercial Bulletin," of Minneapolis, Minn., for May, 1937.

Exhibit "I"—"California Retail Grocers' Advocate" for April 23, 1937.

Exhibit "J" contains eight extracts from the general press in widely scattered sections of the country and is submitted as typical of a vast collection of such articles in my possession, which it is considered too burdensome to set forth in full herein.

CRICHTON CLARKE.

Sworn to before me this twenty-eighth day of June, 1937.

MARGARET C. HAYDEN,
Notary Public, Westchester County.
N. Y. Co. Clk's No. 717, Reg. No. 9-H-462.
Commission expires March 30, 1939.

EXHIBIT A.

May 7, 1937

National Biscuit Co. v. Kellogg Co.

Hon. Joseph Buffington,
Hon. J. Warren Davis,
Hon. J. Whitaker Thompson,
United States Circuit Judges
Philadelphia, Pa.

Sirs:

We have read and considered "Appellee's Petition for Rehearing", and do not intend to submit a reply or, more properly speaking, ask the Court for permission to file a reply. We see nothing new in the petition or anything but a re-hash of the arguments advanced in the defendant's briefs on the first hearing

and on the rehearing. As the Court has, of course, considered those arguments, it will not, we assume, wish a reply thereto. The defendant persists in disregarding the broad features upon which this Court's decision on rehearing is based and tries to confine the case in the narrow groove of technicalities, in which light it induced the Court on the first hearing to view the case, and which treatment of the case was found to be incorrect and was discarded by the Court after the rehearing. There are two statements made in the petition, however, which we wish to refute.

(a) It is claimed that defendant has never had an opportunity to present "a full oral argument" in the case. This we deny. On the rehearing, both Mr. Clarke and Mr. Rogers were heard, so far as we recollect, as fully as they expressed a desire to be heard. Our recollection is that they consumed substantially all of the time which the rules of the Court permit. In addition, subsequent to the argument, defendant filed a brief entitled "Defendant's Memorandum After Rehearing". This consists of 14 pages. Again, on November 24, 1936, nearly two months after the argument, counsel for the defendant wrote the Clerk of this Court a long letter calling attention to the fact that a writ of certiorari had been denied in a case cited in its brief on rehearing. Still later, counsel for the defendant brought to the Court's attention the opinions of the Court of Appeals in Ontario. How it is possible, in view of these facts, for the defendant to now contend that it has not had a full and fair opportunity to be heard is beyond our comprehension.

(b) It is now stated that plaintiff "specifically conceded that an injunction as broad as that now ordered could not issue". Defendant refers to the matter of the form or shape of the biscuit. Again, we are

unable to understand how it can make that statement in view of Point V of our brief on rehearing which is in bold-face type. We quote the same:

"IRRESPECTIVE OF WHETHER PLAINTIFF IS ENTITLED TO THE EXCLUSIVE USE OF THE NAME 'SHREDDED WHEAT', DEFENDANT SHOULD EITHER BE ENJOINED FROM MAKING ITS BISCUITS IN SUBSTANTIALLY THE FORM OR SHAPE WHICH HAS CHARACTERIZED PLAINTIFF'S BISCUITS FOR MORE THAN FORTY YEARS, OR, AT ANY RATE, REQUIRED TO PLACE UPON EACH BISCUIT SOME DISTINCTIVE MARK."

We are, of course, sending a copy of this letter to counsel for the defendant.

Respectfully,

David A. Reed

Thomas G. Haight

Drury W. Cooper

Charles A. Vilas

Counsel for Plaintiff-Appellant

EXHIBIT B.

May 14, 1937

Hon. Joseph Buffington,
Hon. J. Warren Davis,
Hon. J. Whitaker Thompson,
United States Circuit Judges
Philadelphia, Pa.

Re: National Biscuit Co. v. Kellogg Co.

Sirs:

We have received and considered a copy of a letter addressed to you by the plaintiff's counsel under date of May 7, 1937 in which issue is taken with only two statements made in the petition for rehearing, namely,

(a) That defendant was induced to forego a full argument of the case on both hearings, at the first hearing by suggestion of the Court and at the second hearing by suggestion of the Court and concessions made by plaintiff at the first hearing, and in plaintiff's brief on the rehearing. Defendant respectfully insists that the Court has never heard it on the question of an injunction restraining it from making the biscuit under any name or in any kind of a carton or whether marketed by the most scrupulously fair methods of competition that can be suggested. We cannot be too emphatic about this. Judge Haught specifically conceded under questions by Judge Buffington at the original hearing that the Court had no power to issue such an injunction. This concession was specifically included in the plaintiff's brief on rehearing and quoted at page 14 of defendant-appellee's petition for rehearing. The same concession is included in the very matter quoted in plaintiff's counsel's letter of May 17th which states ". . . defendant should be either enjoined from making its biscuit . . . or, at any rate required to place upon each biscuit some distinctive mark." This is precisely what defendant did. It enclosed each biscuit in a sealed and distinctively marked carton and it made each so much shorter than plaintiff's biscuit that plaintiff actually copied defendant's small biscuit as to size and thus cancelled the substantial size distinction which defendant had voluntarily adopted. Defendant, therefore, at both hearings received and acted on the specific concession of the plaintiff and in doing so refrained from arguing its conceded indubitable right to make the biscuit itself. The attention of the Court is respectfully directed in this respect to page 5 of the defendant-appellee's brief on rehearing which states in black faced type

"Plaintiff's belated concession of defendant's indubitable right to make the patent expired biscuit, necessarily ~~concedes~~ defendant's equally indubitable right to call it by its patent expired name."

Defendant respectfully insists that in fairness and justice it should be heard in opposition to a contention which was specifically abandoned by the plaintiff and that such rehearing should be had before such a heretofore unheard of type of injunction going far beyond any injunction ever ordered in any unfair trade case shall be decreed. Defendant's counsel know of no prior case in which a Court had disregarded distinctive cartons and enjoined the distinctively sized contents. Such an injunction, if the Court has power to issue and enforce it, (which we respectfully deny) would give the defendant a monopoly on its cornflakes much more valuable than any right it has ever exercised on shredded wheat.

(b) Plaintiff's point (b) answers itself. The bold faced matter quoted by plaintiff from its brief on rehearing is a second written concession of the defendant's right to make the biscuit.

(c) We welcome plaintiff's reply for the reason that it emphasizes more than anything which has yet occurred in the case the fact that plaintiff simply has no reply to the point that in the most solemn statutory manner it repeatedly disclaimed trademark rights in both the words shredded wheat and in the form and shape of the biscuit for the specific purpose of being able to register other things as its trademark.

This point has been pressed upon the Court in every brief filed in this Court and in the District Court. The defendant has called to the attention of the Court

the fact of plaintiff's disclaimers. The decision of the District Court and the first decision of this Court were based on grounds which made it unnecessary to consider the statutory disclaimers. The plaintiff in no brief and on none of the arguments has attempted to answer this point which necessarily arises as an answer to the ground on which the Court on rehearing based its opinion. We respectfully emphasize the suggestion—that the reason the plaintiff has never offered the Court any argument, suggestion, reply or avoidance of these statutory disclaimers is that no reply is possible, and that the plaintiff can only hope that the Court will overlook it.

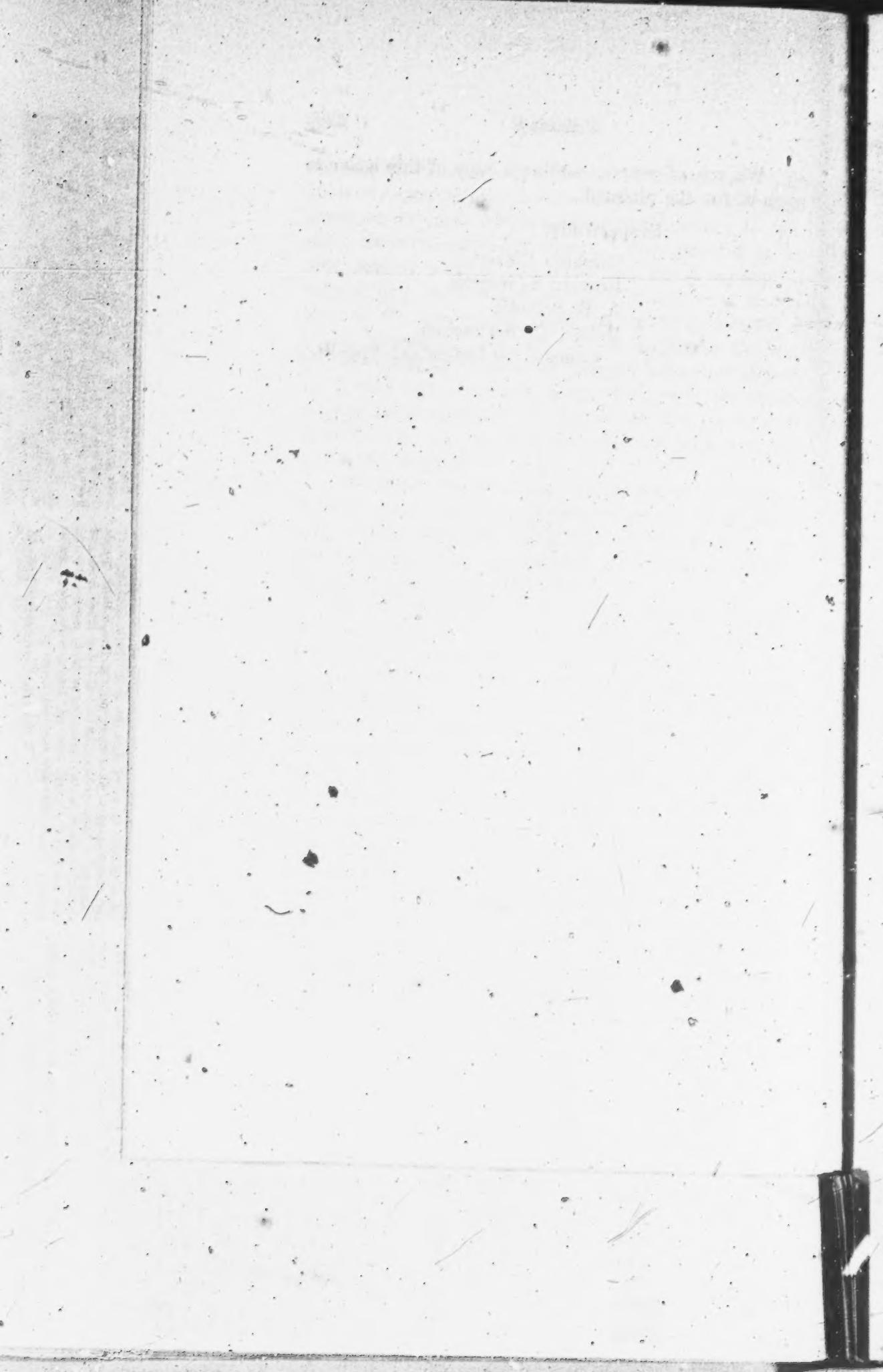
We earnestly insist that the injunction ordered as to both name and form is completely barred by these irrevocable statutory disclaimers. The point is nowhere touched upon in either decision of this Court and should be considered on rehearing.

It was not necessary for either Court to consider these disclaimers so long as the bill was ordered dismissed on other grounds. But when the Court proposed to hold that both name and form of the biscuit are or have become exclusive trademark property, it then becomes necessary for the Court to decide specifically how these irrevocable disclaimers can be avoided, if at all. Otherwise they stand as an insurmountable barrier to the injunction ordered as to both name and form. This Court we feel cannot fairly allow its present decision to stand without hearing from the plaintiff on this point. We further feel that after consideration of the point, this Court should include its view in its opinion for the benefit of the United States Supreme Court for its consideration upon a petition for writ of certiorari. If the questions are certified, this is one of the questions to be so determined.

We are, of course, sending a copy of this letter to
counsel for the plaintiff.

Respectfully,

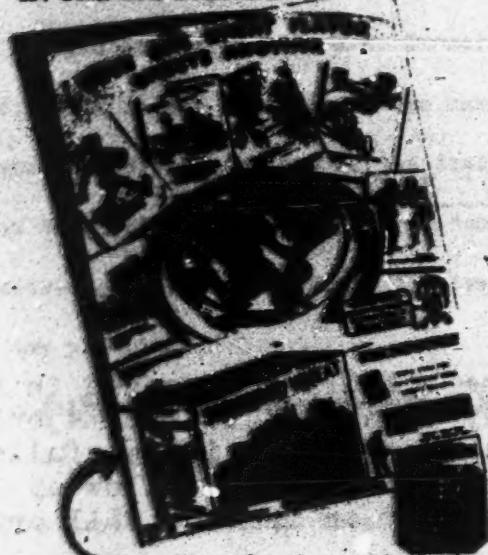
Crichton Clarke,
Edward S. Rogers,
A. B. Seibold,
Robert T. McCracken,
Counsel for Defendant-Appellee.



May, 1937

THE OREGON MERCHANTS' MAGAZINE

**STAR PERFORMER
IN THE BIG PARADE**



This action advertisement in 4 colors appears in the May 16th magazine section of

San Francisco Chronicle
Oakland Tribune
Sacramento Union

Los Angeles Times
Long Beach Press-Telegram
San Diego Union

Phoenix Republic
Portland Oregonian
Tacoma Ledger

Seattle Times
Spokane Spokesman-Review
Salt Lake City Tribune

Put this DOUBLE FEATURE PROFIT HIT to work NOW!

The top of the strawberry season is here.

Now is the time to cash in on that famous volume team—
Shredded Wheat and strawberries.

Your National Biscuit Company salesman has a brilliant new
parade of display material. Ask him about it.

Feature this team in your own advertising.

And remember, we're right behind you with a big power-house of advertising. Two out of every three families in your neighborhood see the flow of dominating, colorful, advertisements in thirty leading magazines, the American Weekly, Comic Section, Associated Weekly Group, and scores of local Western newspapers.

A PRODUCT OF
NATIONAL BISCUIT COMPANY

Shredded Wheat is made in the modern Oakland, California, plant

National Biscuit Co. Wins Shredded Wheat Decision

Court Enjoins Kellogg Co. From Use of Shredded Wheat in Name, Shape or Form

Herewith we reproduce Judge J. Warren Davis' opinion.

PHILADELPHIA, April 12.—U. S. Circuit Court of Appeals for the Third Circuit today reversed a former decision in the case of National Biscuit Company vs. Kellogg Company involving the use of the trade name "Shredded Wheat." The court declared that the Kellogg Company employed "unfair competitive and untruthful statements to deceive the public and secure the trade which in equity and good conscience belonged to the plaintiff."

Following is an excerpt from Judge J. Warren Davis' opinion:

"The defendant (Kellogg Company) appropriated not only the name of the plaintiff's product (Shredded Wheat), but also its form and shape which has characterized the biscuit for more than forty years. . . .

"In order to secure the property of the plaintiff in the name and form of its product, the defendants placed upon its cartons the words, 'The original has this signature: W. K. Kellogg'. That is, defendant not only adopted the name and form of plaintiff's product, but also claimed that its product was the *original* and by implication that the plaintiff's was an *imitation*. There could have been but one object for doing this, and that was by unfair competition and untruthful statements to deceive the public and secure

the trade which in equity and good conscience belonged to the plaintiff."

... a decree will be entered vacating our former decree and reversing the decree of the District Court with directions to the court to enter a decree enjoining the defendant (Kellogg Co.) from the use of the name 'Shredded Wheat' as its trade name and from advertising or offering for sale its product in the form and shape of plaintiff's biscuit in violation of its trademark; and with further directions to order an accounting for damages and profits."

"Shredded Wheat," a product of the National Biscuit Company, has been manufactured at Niagara Falls, N. Y., since 1900.

You Are Old When—

- You no longer shrill at the thought of work.
- You begin to doubt your ability to hold on.
- You no longer have a thirst for knowledge.
- You begin your day's work without enthusiasm.
- You no longer laugh at adversity and ignore danger.
- You begin to measure time by the calendar rather than by accomplishments.—*Capper's Weekly*.

3208

EXHIBIT "D."

N. Y., 4/15/37

HERE IS SOME BIG NEWS!

To MANAGERS:

We know you will be vitally interested in the attached release which has already been sent to the majority of daily papers throughout the country. Read it carefully, and then check with your local newspapers as a follow-up to see whether it either has been printed or if they will print it immediately.

The newspapers have undoubtedly received their copy of the release sent by our publicity agency and it has probably gone through their regular editorial channels. However, as a double check, we wish you would pass it along to them with a definite request to print it verbatim.

Please send us tear sheets of the issues in which it appears.

ADVERTISING DEPARTMENT.





2200

EXHIBIT "D-1"

FOR IMMEDIATE RELEASE

NATIONAL BISCUIT COMPANY
WINS REVERSED SUIT DECISION
Court Enjoins Kellogg Company from Use
of Shredded Wheat in Name, Shape or Form.

PHILADELPHIA: April 18: U.S. Circuit Court of Appeals for the Third Circuit today reversed a former decision in the case of National Biscuit Company vs. Kellogg Company involving the use of the trade name "Shredded Wheat". The court declared that the Kellogg Company employed "unfair competition and untruthful statements to deceive the public and secure the trade which in equity and good conscience belonged to the plaintiff."

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"...a decree will be entered vacating our former decree and reversing the decree of the District Court with directions to the court to enter a decree enjoining the defendant (Kellogg Co.) from the use of the name 'Shredded Wheat' as its trade name and from advertising or offering for sale its product in the form and shape of plaintiff's biscuit in violation of its trademark; and with further directions to order an accounting for damages and profits."

"Shredded Wheat" a product of the National Biscuit Company has been manufactured at Niagara Falls, N. Y. since 1900.

THE LOUISIANA GROCER

April, 1937

The Louisiana Grocer

Second at the Post Office at New Orleans, La., on Second-Class Matter

Published the Second Week in Each Month by the

NEW ORLEANS RETAIL GROCERS' ASSOCIATION

NEW ORLEANS - BIRMINGHAM - MEMPHIS

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All contributions must reach the Editor before the first of each month. Copy for advertisements likewise.

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This Journal is published in the interest of retail grocers and the members of which it is the organ, and is not owned or controlled by any individual or firm.

IT IS THE OFFICIAL PUBLICATION
of the New Orleans Retail Grocers' Association and of the
Retail Merchants' Association of Louisiana**Fair Trade Laws**

Fair trade practice laws have been enacted by 12 states since January, and bills proposing such laws are pending in 15 other states, a summary of fair-trade acts made public by the American Retail Federation shows. Fifteen states had such laws at the close of last year.

Only Connecticut and Vermont have defeated fair trade practice proposals in current legislative sessions.

Fair trade bills have been passed and signed by the governors in the following states:

Arkansas (H. 98), Georgia (S. 72), Indiana (S. 23), Kansas (S. 96), Kentucky (H. 13), Montana (H. 70), Nevada (H. 130), New Mexico (H. 23), South Dakota (S. 8), Tennessee (H. 320), West Virginia (H. 204), Wyoming (S. 15).

Bills have been passed by one or both houses of the legislature in the states of—

Colorado (H. 513), Idaho (H. 315), North Carolina (H. 435), North Dakota (H. 209), Oklahoma (S. 45), South Carolina (H. 409).

National Biscuit Company Wins Shredded Wheat Decision

PHILADELPHIA: U. S. Circuit Court of Appeals for the Third Circuit reversed a former decision in the case of National Biscuit Company vs. Kellogg Company involving the use of the trade name "Shredded Wheat". The court declared that the Kellogg Company employed "unfair competition and untruthful statements to deceive the public and secure the trade which in equity and good conscience belonged to the plaintiff."

Following is an excerpt from Judge J. Warren Davis' opinion:

"The defendant (Kellogg Company) appropriated not only the name of the plaintiff's product (Shredded Wheat), but also its form and shape which has characterized the biscuit for more than forty years . . .

"In order to secure the property of the plaintiff in the name and form of its product, the defendant placed upon its cartons the words, 'The original has this signature: W. K. Kellogg.' That is, defendant not only adopted the name and form of plaintiff's product, but also claimed that its product was the *original* and by implication that the plaintiff's was an *imitation*. There could have been but one object for doing this, and that was by unfair competition and untruthful statements, to deceive the public and secure the trade which in equity and good conscience belonged to the plaintiff.

" . . . a decree will be entered vacating our former decree and reversing the decree of the District Court with directions to the court to enter a decree enjoining the defendant (Kellogg Co.) from the use of the name 'Shredded Wheat' as its trade name and from advertising or offering for sale its product in the form and shape of plaintiff's biscuit in violation of its trademark; and with further directions to order an accounting for damages and profits."

"Shredded Wheat" a product of the National Biscuit Company has been manufactured at Niagara Falls, N. Y., since 1900.

Nine other states have fair trade bills pending. They are: Delaware (S. 61), Maine (H. 115, S. 265), Massachusetts (H. 397, H. 548, H. 549, H. 975, H. 1106, S. 122, S. 296), Michigan (H. 32), Minnesota (H. 277), S. 65), Missouri (H. 118, H. 119), Nebraska (Bill 131), New Hampshire (H. 62), Texas (H. 58, S. 24, S. 163).

No fair trade bills have been introduced in the legislatures of Alabama or Utah.

Amendments to or substitutes for existing fair trade laws are pending in these states:

Maryland (H. 41), New Jersey (S. 131), New York (H. 414, S. 82), Ohio (S. 263), Washington (S. 70).

NATIONAL BISCUIT COMPANY
Wins Shredded Wheat Decision Against Kellogg Company
Philadelphia, April 12.—U. S. Circuit Court of Appeals for the Third Circuit today reversed a former decision in the case of National Biscuit Company vs. Kellogg Company involving the use of the trade name "Shredded Wheat." The court declared that the Kellogg Company employed "unfair competition and untruthful statements to deceive the public and secure the trade which in equity and good conscience belonged to the plaintiff."

Following is an excerpt from Judge J. Warren Davis' opinion:

"The defendant (Kellogg Company) appropriated not only the name of the plaintiff's product (Shredded Wheat), but also its form and shape which has characterized the biscuit for more than forty years. In order to secure the property of the plaintiff in the name and form of its product, the defendant placed upon its cartons the words 'The original has not only adopted the name and form of plaintiff's product, but also claimed that its product was the ORIGINAL and by implication that the plaintiff's was an IMITATION. There could have been but one object for doing this, and that was by unfair competition and untruthful statements, to deceive the public and secure the trade which in equity and good conscience belonged to the plaintiff."

"A decree will be entered vacating our former decree and reversing the decree of the District Court with directions to the court to enter a decree terminating the plaintiff's trade name "Shredded Wheat."

W E S TERN TRADES (A). 1937
National Biscuit Co. Wins
Shredded Wheat Decision

Philadelphia, Pa.—The U. S. Circuit Court of Appeals for the Third Circuit, in session here in April, reversed a former decision in the case of National Biscuit Company vs. Kellogg Company, involving use of the trade name "Shredded Wheat."

Following is an excerpt from Judge J. Warren Davis' opinion: (Our authority being a news release from the publicity division of National Biscuit Co.)

"The defendant (Kellogg Company) appropriated not only the name of the plaintiff's product (Shredded Wheat), but also its form and shape which has characterized the biscuit for more than 10 years"

"In order to secure the property of the plaintiff in the name and form of its product, the defendant placed upon its cartons the words, 'The original has this signature: W. K. Kellogg.' That is, defendant not only adopted the name and form of plaintiff's product, but also claimed its product was the original and by implication that the plaintiff's was an imitation. There could have been but one object in doing this, and that was by unfair competition and untruthful statements, to deceive the public and secure the trade which in equity and good conscience belonged to the plaintiff."

"A decree will be entered vacating our former decree and reversing the decree of the District Court with directions to the court to enter a decree enjoining the defendant (Kellogg Co.) from the use of the name 'Shredded Wheat' as its trade name and from advertising or offering for sale its product in the form and shape of plaintiff's biscuit in violation of its trademark; and with further directions to order an accounting for damages and

joining the defendant (Kellogg Co.) from the use of the name 'Shredded Wheat' as its trade name and from advertising or offering for sale its product in the form and shape of plaintiff's biscuit in violation of its trademark; and with further directions to order an accounting for damages and profits."

"Shredded Wheat," a product of the National Biscuit Company, has been manufactured at Niagara Falls, N. Y., since 1900.

SUPER MARKET MERCHANTISING
NYC
5/37

National Biscuit Co. Wins Court I Decision

Philadelphia, Pa.—U. S. Circuit Court of Appeals for the Third Circuit reversed a former decision in the case of National Biscuit Company vs. Kellogg Company involving the use of the trade name "Shredded Wheat". The court declared that the Kellogg Company employed "unfair competition and untruthful statements to deceive the public and secure the trade which in equity and good conscience belonged to the plaintiff."

Following is an excerpt from Judge J. Warren Davis' opinion:

"The defendant (Kellogg Company) appropriated not only the name of the plaintiff's product (Shredded Wheat), but also its form and shape which has characterized the biscuit for more than forty years.

"In order to secure the property of the plaintiff in the name and form of its product, the defendant placed upon its cartons the words, 'The original has this signature: W. K. Kellogg.' That is, defendant not only adopted the name and form of plaintiff's product, but also claimed that its product was the original and by implication that the plaintiff's was an imitation. There could have been but one object in doing this, and that was by unfair competition and untruthful statements, to deceive the public and secure the trade which in equity and good conscience belonged to the plaintiff."

Following is an excerpt from Judge J. Warren Davis' opinion:

"The defendant (Kellogg Company) appropriated not only the name of the plaintiff's product (Shredded Wheat), but also its form and shape which has characterized the biscuit for more than forty years.

"In order to secure the property of the plaintiff in the name and form of its product, the defendant placed upon its cartons the words, 'The original has this signature: W. K. Kellogg.' That is, defendant not only adopted the name and form of plaintiff's product, but also claimed that its product was the original and by implication that the plaintiff's was an imitation. There could have been but one object in doing this, and that was by unfair competition and untruthful statements, to deceive the public and secure the trade which in equity and good conscience belonged to the plaintiff."

"The original has this signature: W. K. Kellogg.' That is, defendant not only adopted the name and form of plaintiff's product, but also claimed that its product was the original and by implication that the plaintiff's was an imitation. There could have been but one object in doing this, and that was by unfair competition and untruthful statements, to deceive the public and secure the trade which in equity and good conscience belonged to the plaintiff."

"The original has this signature: W. K. Kellogg.' That is, defendant not only adopted the name and form of plaintiff's product, but also claimed that its product was the original and by implication that the plaintiff's was an imitation. There could have been but one object in doing this, and that was by unfair competition and untruthful statements, to deceive the public and secure the trade which in equity and good conscience belonged to the plaintiff."

"Shredded Wheat," a product

of the National Biscuit Company,

has been manufactured at Ni-

agara Falls, N. Y., since 1900.

EXHIBIT "E"

USA CIGAR & TOBACCO COMPANY,
has been manufactured at Ni-
agara Falls, N. Y., since 1900.

that the plaintiff's was an imitation. There could have been but one object or doing this, and that was by unfair competition and untruthful statements, to deceive the public and secure the trade which in equity and good conscience belonged to the plaintiff.

"... a decree will be entered vacating our former decree and reversing the decree of the District Court with directions to the court to enter a decree enjoining the defendant (Keflogg Co.) from the use of the name 'Shredded Wheat' as its trade name and from advertising or offering for sale its product in the form and shape of plaintiffs biscuit in violation of its trademark; and with further directions to order an accounting for damages and profits."

Shredded Wheat, a product of the National Biscuit Company, has been manufactured at Niagara Falls, N. Y., since 1900.

NORTHWESTERN MERCHANT
 "Leading Pacific Northwest Food Journal"
 Seattle, Wash.

MAY 1937 2158

May, 1937

about getting a Bureau Report, and bring us, in proportion to Trade Volume, the largest element of our ultimate losses. This group formerly represented about 21.2% of the General Public, and constitutes the chief reason for the maintenance of Credit Bureaus.

We must now deal with a suddenly visible shift in the respective Group Percentages as set forth above. Therefore, those percentages should be kept in mind as we proceed, in ensuing issues, to deal with the factors of and the causes for such relatively sudden shifts of Credit Position and Credit Attitude among so large a portion of our Trade and of the Public generally.

United States Circuit Court Reverses Former Decision

PHILADELPHIA, April 12: U. S. Circuit Court of Appeal for the Third Circuit today reversed a former decision in the case of National Biscuit Company vs. Kellogg Company involving the use of the trade name "Shredded Wheat." The court declared that the Kellogg Company employed "unfair competition and untruthful statements to deceive the public and secure the trade which in equity and good conscience belonged to the plaintiff."

Following is an excerpt from Judge J. Warren Davis' opinion:

"The defendant (Kellogg Company) appropriated not only the name of the plaintiff's product (Shredded Wheat), but also its form and shape which has characterized the biscuit for more than forty years.

"In order to secure the property of the plaintiff

in the name and form of its product, the defendant placed upon its cartons the words, 'The original has this signature: W. K. Kellogg.' That is, defendant not only adopted the name and form of plaintiff's product, but also claimed that its product was the original and by implication that the plaintiff's was an imitation. There could have been but one object for doing this, and that was by unfair competition and untruthful statements to deceive the public and secure the trade which in equity and good conscience belonged to the plaintiff.

a decree will be entered vacating our former decree and reversing the decree of the District Court with directions to the court to enter a decree enjoining the defendant (Kellogg Co.) from the use of the name 'Shredded Wheat' as its trade name and from advertising or offering for sale its product in the form and shape of plaintiff's biscuit in violation of its trademark; and with further directions to order an accounting for damages and profits."

"Shredded Wheat," a product of the National Biscuit Company, has been manufactured at Niagara Falls, N. Y. since 1900.

NATIONAL BISCUIT COMPANY WINS SHREDDED WHEAT DECISION

Court Enjoins Kellogg Company From Use of "Shredded Wheat" in Name, Shape or Form.

PHILADELPHIA, April 12: U. S. Circuit Court of Appeals for the Third Circuit today reversed a former decision in the case of National Biscuit Company vs. Kellogg Company involving the use of the trade name "Shredded Wheat." The court declared that the Kellogg Company employed "unfair competition and untruthful statements to deceive the public and secure the trade which in equity and good conscience belonged to the plaintiff."

Following is an excerpt from Judge J. Warren Davis' opinion:

"The defendant (Kellogg Company) appropriated not only the name of the plaintiff's product (Shredded Wheat), but also its form and shape which has characterized the biscuit for more than forty years.

"In order to secure the property of the plaintiff in the name and form of its product, the defendant placed upon its cartons the words, 'The original has this signature: W. K. Kellogg.' That is, defendant not only adopted the name and form of plaintiff's product, but also claimed that its product was the original and by implication that the plaintiff's was an imitation. There could have been but one object for doing this, and that was by unfair competition and untruthful statements, to deceive the public and secure the trade which in equity and good conscience belonged to the plaintiff.

"... a decree will be entered vacating our former decree and reversing the decree of the District Court with directions to the court to enter a decree enjoining the defendant (Kellogg Co.) from the use of the name 'Shredded Wheat' as its trade name and from advertising or offering for sale its product in the form and shape of plaintiff's biscuit in violation of its trademark; and with further directions to order an accounting for damages and profits."

DELICATESSEN MERCHANT
Official Publication of Metropolitan Delicatessen Association and the Only
Tenants Merchants Association Serving the Delicatessen
Industry.
45 West 45th Street, New York City

MAY 10 1937

This article was clipped from
THE CRACKER BAKER
"The only Journal in the world devoted to the
Biscuit and Cracker Industry"

MAY 1937

Court Upholds National Biscuit Shredded Wheat

The Federal Circuit Court of Appeals at Philadelphia on April 12 upheld the National Biscuit Co. in its suit to prevent the Kellogg Co. from using the name "Shredded Wheat" on any of its products.

The court reversed a previous opinion upholding the U. S. District Court for Delaware. It directed the Kellogg Company to refrain from advertising or offering its products for sale in the form and shape used by the biscuit company. Judge J. Warren Davis in granting the injunction said, that the Kellogg company had "appropriated not only the name Shredded Wheat, but also its form and shape which has characterized the biscuit for more than 40 years. In order to secure the property of the plaintiff (National) and the name and form of its product, the defendant (Kellogg) placed upon its cartons the words 'The original has this signature: W. K. Kellogg.' That is, the defendant claimed that his product was the original and by intimation that the plaintiff's was an imitation."

Following is an excerpt from Judge J. Warren Davis' opinion: "The defendant (Kellogg Company) appropriated not only the name of the plaintiff's product (Shredded Wheat), but also its form and shape which has characterized the biscuit for more than forty years. . . . In order to secure the property of the plaintiff in the name and form of its product, the defendant placed upon its carton the words, 'The original has this signature: W. K. Kellogg'. This is, defendant not only adopted the name and form of plaintiff product, but also claimed that its product was the original and by implication that the plaintiff's was an imitation. The defendant could have been but one object for doing this, and that was to unfair competition and untruthful statements, to deceive the public and secure the trade which in equity and good conscience belonged to the plaintiff.

" . . . a decree will be entered vacating our former decree at reversing the decree of the District Court with directions to the court to enter a decree enjoining the defendant (Kellogg Co.) from the use of the name 'Shredded Wheat' as its trade name and accounting for damages and profits."

"Shredded Wheat," a product of the National Biscuit Company, has been manufactured at Niagara Falls, N. Y., since 1890. A decree will be entered vacating

our former decree and reversing the decree of the District Court with directions to the court to enter a decree enjoining the defendant (Kellogg Co.) from the use of the name 'Shredded Wheat' as its trade name and accounting for damages and profits." "Shredded Wheat," a product of the National Biscuit Company, has been manufactured at Niagara Falls, N. Y. since 1900.

**NATIONAL BISCUIT CO. WINS
SHREDDED WHEAT DECISION**

GROC'R'S COM'L. BUL. (Mpls., Minn.)
MAY 1, 1937

UPPING FROM

WOODFIELD REPORTER
(N. Y. C.)
MAY 21, 1937

UPPING FROM

WOODFIELD REPORTER
(N. Y. C.)
MAY 21, 1937

A MISNOMER: Redfield, when the U. S. Circuit Court in Philadelphia held that the Kellogg Company was in infringement of the trade mark, "Shredded Wheat," owned by the National Biscuit Co., it had the following to say about the name: "These threads of wheat come out or extrude from the rollers just as steel rails do when steel is passed between rollers. But it has never been suggested in making wire was 'shredded.' Neither can it be said that wheat is 'shredded' in the plaintiff's process. It is mashed and mangled. The name at most is merely suggestive."

its product, the defendant placed upon its cartons the words, "The original has this signature: W. K. Kellogg. That is, defendant not only adopted the name and form of plaintiff's product, but also claimed that its product was the original and by implication that the plaintiff's was an imitation. There could have been but one object for doing this, and that was to unfair competition and untruthful statements, to deceive the public and secure the trade which in equity and good conscience belonged to the plaintiff.

In Court

After the original patents on shredded wheat expired in 1912, National Biscuit Co. (N.B.C.) knew it couldn't object when other companies manufactured a similar product. But it could and it did when Kellogg Co. brought out Whole

Wheat Biscuits, substituted them since
"dead wheat," added insult to injury by
plastering the carton with: "The original
signature: W. K. Kellogg."
Two years ago NBC fretted when the
U. S. Circuit Court of Appeals in Phila-
delphia found Kellogg within its rights.
It felt better last fortnight when the

SHREDDED WHEAT OWNERSHIP SET

DY,
"State Grocers' Publication—
San Francisco, Cal.

National Biscuit Co. Wins Shredded Wheat Decision

Court Enjoins Kellogg Co. from Use of Shredded Wheat In Name, Shape or Form

PHILADELPHIA.—U. S. Circuit Court of Appeals for the Third Circuit reversed a former decision in the case of National Biscuit Company vs. Kellogg Company involving the uses of the trade name "Shredded Wheat". The court declared that the Kellogg Company employed "unfair competition and untrue statements to deceive the public and secure the trade which is equity and good conscience belonged to the plaintiff".

Following is an excerpt from Judge J. Warren Davis' opinion:

"The defendant (Kellogg Company) appropriated not only the name of the plaintiff's product (shredded Wheat), but also its form and shape which has characterized the biscuit for more than forty years

"In order to secure the property of the plaintiff in the name and form of its product, the defendant placed upon its cartons the words, 'The original has this signature: W. K. Kellogg'. That is, defendant not only adopted the name and form of plaintiff's product, but also claimed that its product was the *original* and by implication that the plaintiff's was an imitation. There could have been but one object for doing this, and that was by unfair competition and untruthful statements, to deceive the public and secure the trade which in equity and good conscience belonged to the plaintiff.

" a decree will be entered vacating our former decree and reversing the decree of the District Court with directions to the court to enter a decree enjoining the defendant (Kellogg Co.) from the use of the name 'Shredded Wheat' as its trade name, and from advertising or offering for sale its product in the form and shape of plaintiff's biscuit in violation of its trademark; and with further directions to order an accounting for damages."

"Garnished Wheat", a product of the National Biscuit Company, has been manufactured at Niagara Falls, N. Y., since 1900.

same court reversed itself in words that admin found significant: "When a person after the expiration of a patient has spent such enormous sums of money to create a valuable property right . . . equity today will not permit another to apply the name . . . of the merchant to his product. . . . There could . . . be but one object for doing this . . . and that was by unfair competition and untrue statements to deceive the public."

...son after the expiration of a patent has spent such enormous sums of money to create a valuable property right ... equity today will not permit another to apply the name ... of the merchant to his product. ... There could ... be but one object for doing this, and that was by unfair competition and untruthful statements to deceive the public."

11-1947 6:1

571

**Kellogg Barred
from Shredded
Wheat Name Use**

the sole use of the "heat" trade-mark. In its decision handed down in former ruling held that the National Company was entitled to January, 1886, when it had the Kellogg Company because the National Company's patent on it had expired. The latest ruling, however, points out that Kellogg adopted the mark after National spent nearly

4-2-18

**CALIFORNIA RETAIL GROCERS
ADVOCATE**

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San Francisco, Cal.

4221027

National Biscuit Co. Wins
Shredded Wheat Decision

Court Enjoins Kellogg Co. from Use of Shredded Wheat in Name, Shape or Form

PHILADELPHIA.—U. S. Circuit Court of Appeals for the Third Circuit reversed a former decision in the case of National Biscuit Company vs. Kellogg Company involving the uses of the trade name "Shredded Wheat". The court declared that the Kellogg Company employed "unfair competition and untrue statements to deceive the public and secure the trade which is equity and good conscience belonged to the plaintiff."

J. Warren Davis.

Following is an excerpt from Judge J. Warren Davis' opinion:

"The defendant (Kellogg Company) appropriated not only the name of the plaintiff's product (Shredded Wheat), but also its form and shape which has characterized the biscuit for more than forty years. . . . In order to secure the property of the plaintiff in the name and form of its product, the defendant placed upon its cartons the words, 'The original has this signature: W. K. Kellogg'. That is, defendant not only adopted the name and form of plaintiff's product, but also claimed that its product was the original and by implication that the plaintiff's was an imitation. There could have been but one object for doing this, and that was by unfair competition and untruthful statements, to deceive the public and secure the trade which in equity and good conscience belonged to the plaintiff.

" . . . a decree will be entered vacating our former decree and reversing the decree of the District Court with directions to the court to enter a decree enjoining the defendant (Kellogg Co.) from the use of the name 'Shredded Wheat' as its trade name, and from advertising or offering for sale its product in the form and shape of plaintiff's biscuit in violation of its trademark; and with further directions to order an accounting for damages."

"Gredded What," a product of the National Biscuit Company, has been manufactured at Niagara Falls, N. Y., since 1890.

Kellogg Barred from Shredded Wheat Name Use

Philadelphia, April 15.—Kellogg Co., Battle Creek, Mich., this week was enjoined against use of the trade name, "Shredded Wheat" in advertising or sale in the form of the similar product of National Biscuit Co., Niagara Falls, N. Y. The injunction was issued by the U. S. Circuit Court of Appeals here in reversing a previous decision in the long legal fight in favor of Kellogg.

The decision says the Kellogg Company employed "unfair competitive practices" in securing the trade which is equity and good conduct which belongs to the plaintiff.

The court held this statement implied the National Biscuit product was an imitation.

Florida to Exhibit at Cleveland Show

Commissioner of Citrus, Florida, has approved an appropriation of \$10,000 for participation in the Great Lakes Exposition during the summer.

The citrus exhibit will be staged in conjunction with that showing of resources of the entire state.

National Biscuit Company Wins Shredded Wheat Decision

The U. S. Circuit Court of Appeals for the Third Circuit last month reversed a former decision in the case of National Biscuit Company vs. Kellogg Company involving the use of the trade name "Shredded Wheat." The court declared that the Kellogg Company employed "unfair competition" and untruthful statements to deceive the public and secure the trade which in equity and good conscience belonged to the plaintiff.

Following is an excerpt from Judge J. Warren Davis opinion:

"The defendant (Kellogg Company) appropriated not only the name of the plaintiff's product (Shredded Wheat)

EXHIBIT "I."

221

**MARTINEZ MERCHANT
BALTIMORE H. S. Cenger**

6/6/37

Shredded Wheat Wins Decision

The United States Court of Appeals for the Third Circuit, a recent despatch from Philadelphia states, reversed a former decision in the case of National Biscuit Company vs. Kellogg Company involving the use of the "Trade Name" "Shredded Wheat". As a result of this decision the Kellogg Company is "enjoined from the use of the name 'Shredded Wheat' as its trade name and from advertising or offering for sale its product in the form and shape of plaintiff's biscuit in violation of its trademark; and with further directions to order an accounting for damages and profits." Shredded Wheat has been manufactured at Niagara Falls since 1900.

AMERICAN

MILLER 7. 567
"Business and Technical Milling Journal"
Chicago, Ill. **MAY** 1937

Kellogg Loses Suit

THIS was enjoinment **last month** against use of the trade name, "Shredded Wheat" in advertising or sale in the form of the similar product of National Biscuit Co. similar product of National Biscuit Co. issued by the U. S. Circuit Court of Appeals in Philadelphia in reversing a previous decision in the long legal fight in favor of Kellogg.

Page Forty-six

PROGRESSIVE GROCER
NYC 7. 6. 81
5/27

KELLOGG LOSES IN REVERSAL OF "SHREDDED WHEAT" DECREE
The U. S. Circuit Court of Appeals for Philadelphia last month reversed a former decision in the case of the National Biscuit Company versus Kellogg Company involving the use of the trade name "shredded wheat" and directed Kellogg from the use of the name "shredded wheat" as its trade name and from advertising or offering for sale its product in the form and shape of the National Biscuit Company's biscuit. It also issued directions ordering an accounting for damages and profits.

WASHINGTON PA REPORTER
PAUL R. MCNAUL
Walls Walls (WN) Union

**National Biscuit Co.
Wins Court Decision**

PITTSBURGH MAY 8. U. S.
Circuit Court of Appeals for the Third Circuit Court of Appeals recently rendered a former decision in the case of National Biscuit Company vs. Kellogg Company involving the use of the trade name "Shredded Wheat." The court declared that the Kellogg Company employed "unfair competition" and untruthful statements to deceive the public which in public and good conscience belonged to the plaintiff.

MAY 1937

NATIONAL BISCUIT COMPANY WINS SHREDDED WHEAT DECISION

PHILADELPHIA—U. S. Circuit Court of Appeals for the Third Circuit received a former decision in the case of National Biscuit Company vs. Kellogg Company involving the use of the trade name "Shredded Wheat". The court declared that the Kellogg Company employed "unfair competition" and untruthful statements to deceive the public and secure the trade which in equity and good conscience belonged to the plaintiff.

"Shredded Wheat", a product of the National Biscuit Company has been manufactured at Niagara Falls, N. Y. since 1900.

GROCERS' SPOTLIGHT

"Semi-monthly Food Trade Newspaper Which Blasts the Food Industry Personnel, Retail and Wholesale, in Greater Detroit, with Plus Circulation in Leading Michigan Cities 1013 Fox Building, Detroit, Michigan

MAY 1 1937

Kellogg Loses To Shredded Wheat

In a reversal of a previous decision gained in a long legal fight, a United States Court has awarded a verdict to the National Biscuit Company against Kellogg Company awarding rights in the name "Shredded Wheat" to National Biscuit, present owners of the Shredded Wheat Biscuit Company, which originated this product many years ago. Kellogg Company was enjoined against use of the trade name "Shredded Wheat," in advertising or sale in the form of the similar product of National Biscuit Company. The injunction was issued by the U. S. Circuit Court of Appeals at Philadelphia in reversing a previous decision in favor of Kellogg. The decision says the Kellogg Company employed "unfair competition" and untruthful statements to deceive the public and secure the trade which in equity and good conscience belonged to the plaintiff. Particularly cited was use of the words on the cartoon: "The original Kellogg" has this signature: W. K. Kellogg. The court held this statement implied the National Biscuit product was an imitation.

Walls Walls (WN) Union
April 27, 1937

6. 501

National Biscuit Wins A Reversal

PITTSBURGH April 26.—United States circuit court of appeals for the third circuit has reversed a former decision in the case of National Biscuit Company involving the use of National Biscuit company's trade name, "Shredded Wheat." The court declared that the Kellogg Company employed "unfair competition" and untruthful statements to company and untruthful statements to deceive the public and secure the trade which in equity and good conscience belonged to the plaintiff.

EXHIBIT "J."

"Shredded Wheat"
Name and Form
IAN Cause of Lawsuit

The U. S. Circuit Court of Appeals, third circuit, last month backed found in favor of the plaintiff. In the National Biscuit Company, Incorporated, in enjoined from further use of the name "Shredded Wheat" and the form and shape of the product, and has been required to render an account of raw materials in employing name, and from manufacture of the Kellogg Company, against the name "Shredded Wheat" and the form of the Kellogg Company, according to Clem Co. as Hildebrand, manager of the central agency for National Biscuit Company. Wheat has been shredded at Niagara Falls manufactured at Mr. Hildebrand since 1900. Mr. Hildebrand stated, and the trade-name has erred become a household word.

EXHIBIT "K"



SHREDDED WHEAT

A Product of NATIONAL BISCUIT COMPANY

THE EAST COAST STORES SUGGEST
THAT YOU USE NOTHING BUT

THE ORIGINAL SHREDDED WHEAT

FOR YOUR BREAKFAST

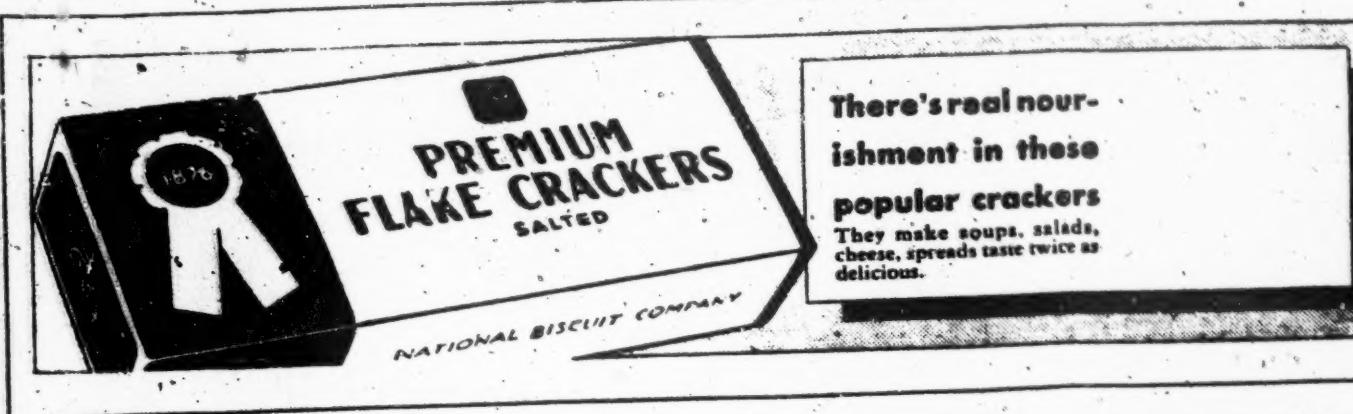
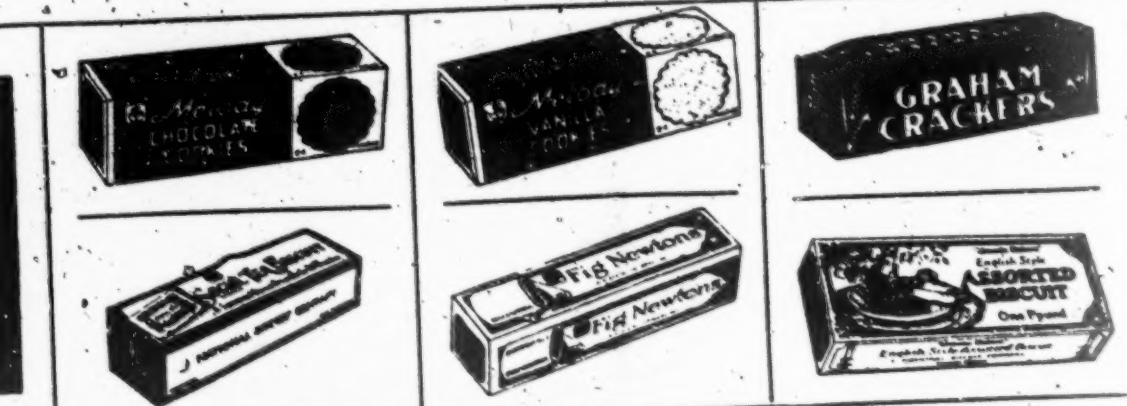
THIS AND MANY OTHER FINE NATIONAL BISCUIT COMPANY VARIETIES
BE OBTAINED FROM YOUR GROCER



RITZ

America's most popular cracker

The most delicious cracker ever ... Eat them alone or with soups, salads, cheeses, beverages. Order a package today.



There's real nourishment in these popular crackers

They make soups, salads, cheese, spreads taste twice as delicious.

OREO SANDWICH

A delicious chocolate wafer with a creamy smooth filling.



AY 25 1934

4. The instructions contained in said letters Exhibit A and Exhibit B reach the entire selling organization of National Biscuit Company through the respective managers of its selling agencies, and to the best of my knowledge and belief have been communicated to every employee of National Biscuit Company engaged in selling its product. It is also my information and belief, based upon reports from the various agencies of the company and upon conversations with managers, that the instructions contained in said letters have been and will continue to be fully complied with.

WILLIAM W. ROSSITER.

Sworn to before me this seventh day of June,
1937.

(Seal) A. T. BULLOCK,
Notary Public, Queens Co. No. 204.
Registered in Queens Co. No. 152.
Certificate filed in New York Co. No. 62.
Registered in New York Co. No. 8-B-47.
Commission expires March 30, 1938.

EXHIBIT "A."

Circular to all Agencies.

N. Y., 5/13/37.

To MANAGERS:

Some of the circulars addressed by the District Sales Managers and Managers to their organizations indicate a slight misunderstanding as to the present status of the litigation against the Kellogg Company concerning Shredded Wheat. You recently received copies of the opinion of the Circuit Court of Appeals for the Third Circuit, together with news releases. That opinion directs the issuance of an injunction but the injunction has not yet been issued by the District Court. While it is entirely proper for a successful litigant to advise his organization, and his customers also, of a court decision in his favor, care should be taken not to anticipate the completion of the case by our Legal Department.

In this connection, your communications to the trade should be confined to a statement of the fact of the decision of the Court of Appeals. You should decline to offer any suggestions as to what your customers should do with respect to the Kellogg's stocks on hand or with respect to continuing purchases and sales. Above all things, no threats of any kind should be indulged in.

The Kellogg Company is seeking a rehearing of the case and if that is denied they may appeal the case to the Supreme Court of the United States. In such event it may be several months before the case is reduced to final judgment. When that takes place you will be duly advised.

SALES DEPARTMENT,

W. Whosier

MANAGER.

EXHIBIT "B."

Circular to all Agencies.

N. Y., 5/26/37.

To MANAGERS:

Supplementing our circular letter of May 13, 1937, please make no use whatever of the recent decision or opinion of the United States Circuit Court of Appeals for the Third Circuit in the action against the Kellogg Company concerning "Shredded Wheat".

The Kellogg Company has recently complained to the Court that an improper use has been made of the decision and opinion. So far as our investigation has revealed, this complaint is not justified. The National Biscuit Company does not wish, however, to have any of its agents or employees do anything which may possibly be construed as an improper use of the decision or opinion.

If anyone is asked about the decision or opinion or its effect, the reply should be as set forth in the last two paragraphs of the circular of May 13, 1937, reading as follows:

"In this connection, your communications to the trade should be confined to a statement of the fact of the decision of the Court of Appeals. You should decline to offer any suggestions as to what your customers should do with respect to the Kellogg's stocks on hand or with respect to continuing purchases and sales. Above all things, no threats of any kind should be indulged in.

"The Kellogg Company is seeking a rehearing of the case and if that is denied they may appeal the case to the Supreme Court of the United States. In such event it may be several months before the case is reduced to final judgment. When that takes place you will be duly advised."

SALES DEPARTMENT,

W. W. Lassiter

Manager.

AFFIDAVIT OF LEWIS CHARLES BLEIL.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS,
FOR THE THIRD CIRCUIT.

No. 5801. October Term, 1936.

National Biscuit Company,
Plaintiff-Appellant,
against
Kellogg Company,
Defendant-Appellee.

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss

LEWIS CHARLES BLEIL, being duly sworn, deposes and says:

1. I am a route salesman employed by National Biscuit Company and I reside at Saratoga Springs, New York, and am working out of the Schenectady agency of National Biscuit Company under Mr. P. J. Beilman, manager. I have been with National Biscuit Company for twenty-one years and have been in this territory about sixteen years.

2. Among the customers which it is my duty to visit is Mr. R. J. Parry, assistant superintendent of Grand Union Tea Company, with headquarters at Glens Falls, New York, and having jurisdiction over the Grand Union Tea Company's stores in the northern district, including Glens Falls, Hudson Falls, Saratoga Springs, Plattsburg—approximately ten stores. Shortly after the decision in this case filed April 12, 1937, I had occasion to call on Mr. Parry, at which time I showed him the news release describing and quoting from the opinion of the Court. He expressed his satisfaction at not being required in the future to handle two kinds of Shredded Wheat.

3. Upon a second visit, Mr. Parry told me that a representative of the Kellogg Company had called upon him and told him it was not true that National Biscuit Company had won its case and that the Kellogg Company would continue to supply him with Shredded Wheat in any quantity he wished.

I have read a purported copy of a letter from J. J. Casey contained on page 3 of the affidavit of C. F. Baumgart, verified June 19, 1937, and I am the personal representative of the National Biscuit Company referred to in that letter, and the conversations narrated above are the only conversations I had with Mr. Parry concerning Shredded Wheat or the decision in this case.

5. I have read the sales department circulars dated respectively May 13th and May 26th, 1937, and have fully complied with the instructions therein contained in every respect. I have never used the decision for the purpose of furthering the sales of Shredded Wheat other than to state the facts as I have above narrated. Indeed, I have been too busy selling other products of National Biscuit Company to spend any time in attempting to make an unfair or improper use of the decision.

LEWIS CHARLES BLEIL.

Sworn to before me this second day of July, 1937.

GEORGE H. KLEIN,

Notary Public, Bronx County.

Bronx Co. Clerk's No. 58, Reg. No. 24-K-39.

N. Y. Co. Clerk's No. 447, Reg. No. 9-K-268.

Kings Co. Clerk's No. 47, Reg. No. 9188.

Commission expires March 30, 1939.

AFFIDAVIT OF WALTER S. LARSON.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS,
FOR THE THIRD CIRCUIT.

No. 5801. October Term, 1936.

National Biscuit Company,
Plaintiff-Appellant,
against
Kellogg Company,
Defendant-Appellee.

STATE OF NEW YORK, } ss.:
COUNTY OF NEW YORK,

WALTER S. LARSON, being duly sworn, deposes and says:

1. I am sales manager of the National Biscuit Company agency in Williamsport, Pennsylvania, and have held that position since January, 1931, and have been with the company since 1918. I have read the letter from Williamsport quoted on page 4 of the affidavit of Crichton Clarke, verified June 28th, 1937, in which the statement is made that National Biscuit Company salesmen are giving the impression to merchants in my territory that they will be subject to prosecution for handling Kellogg's Whole Wheat Biscuit. I can say positively that this statement is wholly untrue. I have six salesmen under me, all of whom I know well and all of whom have been carefully instructed to make no derogatory statements concerning the Kellogg Company or the decision in this litigation, and the instructions contained in the sales department

circulars of May 13th and May 26th, 1937, respectively,
have been strictly adhered to by me and by all salesmen
under my jurisdiction.

WALTER S. LARSON.

Sworn to before me this first day of July, 1937.

GEORGE H. KLEIN,

Notary Public, Bronx County.

Bronx Co. Clerk's No. 58, Reg. No. 24-K-39.
N. Y. Co. Clerk's No. 447, Reg. No. 9-K-268.
Kings Co. Clerk's No. 47, Reg. No. 9188.
Commission expires March 30, 1939.

AFFIDAVIT OF WILBUR A. MOSER.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS,
FOR THE THIRD CIRCUIT.

No. 5801. October Term, 1936.

National Biscuit Company,
Plaintiff-Appellant,

against

Kellogg Company,
Defendant-Appellee.

STATE OF NEW YORK, } ss.:
COUNTY OF NEW YORK,

WILBUR A. MOSER, being duly sworn, deposes and says:

1. I reside in Uniontown, Pennsylvania, and am sales manager of the National Biscuit Company agency located in that city. I have been in that position since January 1st, 1927, and have been with the company in the sales department since April, 1915. I have read page 6 of the affidavit of C. F. Baumgart, verified June 19th, 1937, in which is quoted a letter from O. K. Berry, district sales manager of Kellogg Sales Company, addressed to Mr. Crichton Clarke, in which the statement is made that "the man in charge of National Biscuit Company's sales in the Uniontown area addressed the United Quality Food Stores' representatives, which consists of thirty or thirty-five retailers, and stated that Kellogg was no longer permitted to

make and sell Kellogg's Shredded Whole Wheat Biscuit.

2. The statement quoted is wholly untrue. There are two groups of retail stores in Uniontown, one called United Quality Stores and the other called Quality Food Stores. The former consists of thirty or thirty-five stores, the latter of about fourteen stores. The United Quality Stores hold meetings every Tuesday evening and I have attended every meeting for at least three years. I have never addressed the meeting and I have never made the statement that Kellogg is no longer permitted to make and sell Shredded Whole Wheat Biscuit, nor any statement substantially to that effect, nor any statement about the litigation between National Biscuit Company and Kellogg Company other than in private conversation to tell customers of the fact of the decision of April 12th, 1937. No other representative or official of the National Biscuit Company has ever addressed a meeting of United Quality Stores at any time within the past three years, and, to the best of my knowledge and belief, no such statement by any representative of National Biscuit Company has been made either publicly or privately in my territory.

3. The Morning Herald and the Evening Genius, both daily newspapers of Uniontown, printed on April 20th, 1937, a statement of the fact of the decision of the Court with extracts from the opinion so that members of the trade reading the daily papers were advised of the fact.

4. I have received and read the sales department circulars dated respectively May 13th and May 26th, 1937, and have communicated the contents of the same to the salesmen under my jurisdiction. No statement

in any way derogatory or damaging to the Kellogg Company has been made in my territory to the best of my knowledge and information.

WILBUR A. MOSER.

Sworn to before me this first day of July, 1937.

GEORGE H. KLEIN,

Notary Public, Bronx County.

Bronx Co. Clerk's No. 58, Reg. No. 24-K-39.

N. Y. Co. Clerk's No. 447, Reg. No. 9-K-268.

Kings Co. Clerk's No. 47, Reg. No. 9188.

Commission expires March 30, 1939.

AFFIDAVIT OF SYDNEY P. ALBERT.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS,
FOR THE THIRD CIRCUIT.

No. 5801. October Term, 1936.

National Biscuit Company,
Plaintiff-Appellant,
against
Kellogg Company,
Defendant-Appellee.

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

SYDNEY P. ALBERT, being duly sworn, deposes and says:

1. I reside in Brockton, Massachusetts, and I am sales manager of the National Biscuit Company agency located in that city. I have been in that position since October 1st, 1936, and have been with the company continuously in the sales department since 1919.

2. I have read that portion of the affidavit of C. F. Baumgart, verified June 19th, 1937, relating to a report from Peter B. James, of Brockton, in which it is stated that we had requested the large outlets in Brockton to remove Kellogg's Shredded Wheat Biscuit from the shelves, claiming the same illegal. I am the person who regularly contacts the larger retail outlets in my territory in and about Brockton which handle Shredded Wheat Biscuit and also handle the Kellogg products. The statements just referred to found on page 10 of the said affidavit are wholly untrue. The most that I have said to any customer of

Affidavit of Sydney P. Albert 4 2235

National Biscuit Company concerning the decision of April 12th, 1937, is to inform them of the fact thereof.

3. I have received and read the sales department circulars dated respectively May 13th and May 23d, 1937, and have communicated the contents thereof to all of the salesmen under my jurisdiction, of which there are nine. I state positively that the instructions in those circulars have been strictly complied with by me and to the best of my knowledge and belief by each and every one of the salesmen under my jurisdiction.

SYDNEY P. ALBERT.

Sworn to before me this first day of July, 1937.

GEORGE H. KLEIN,

Notary Public, Bronx County.

Bronx Co. Clerk's No. 58, Reg. No. 24-K-39.

N. Y. Co. Clerk's No. 447, Reg. No. 9-K-268.

Kings Co. Clerk's No. 47, Reg. No. 9188.

Commission expires March 30, 1939.



PLAINTIFF'S AFFIDAVITS.

(Filed July 6, 1937.)

IN THE UNITED STATES CIRCUIT COURT OF APPEALS,
FOR THE THIRD CIRCUIT.

No. 5801. October Term, 1936.

National Biscuit Company,
Plaintiff-Appellant,
against
Kellogg Company,
Defendant-Appellee.

AFFIDAVIT OF WILLIAM W. ROSSITER.

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.;

WILLIAM W. ROSSITER, being duly sworn, deposes and says:

1. I am manager of the sales department of the plaintiff above named, National Biscuit Company, and reside at 281 Montrose Avenue, South Orange, New Jersey.

2. On May 13, 1937, upon the instructions of counsel for National Biscuit Company, I prepared and caused to be mailed to the manager of each selling agency of National Biscuit Company, of which there are approximately 260 throughout the United States, a circular letter of which a true copy is hereto annexed and marked Exhibit A.

3. On May 26, 1937, upon similar instructions from counsel for National Biscuit Company, I prepared and caused to be mailed to the managers of all sales agencies a letter of instructions a true copy of which is annexed hereto and marked Exhibit B.

AFFIDAVIT OF BENJAMIN L. MINGES.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS,
FOR THE THIRD CIRCUIT.

No. 5801. October Term, 1936.

*National Biscuit Company,*Plaintiff-Appellant,
against*Kellogg Company,*

Defendant-Appellee.

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:BENJAMIN L. MINGES, being duly sworn, deposes
and says:

1. I am sales manager in charge of the sales agency of National Biscuit Company in Wilmington, Delaware. I have been with National Biscuit Company Sales Department since 1921 and have been manager at Wilmington since February, 1934. I have read the purported letter set forth on page 4 of the affidavit of Crichton Clarke, verified June 28, 1937, in which it is stated that National Biscuit Company salesmen made certain statements at the Haldas Store, Fifth and King Streets, Wilmington. I am the person who visits the Haldas Store and I recall being in the store at the time the Kellogg Company's salesman was selling a bill of goods to the buyer of that store. I heard him mention Shredded Wheat and asked him if Kellogg

sold Shredded Wheat. He said: "Yes, lots of it." I said: "I thought there was only one Shredded Wheat." I said that I had seen in the paper that the Kellogg Company had lost the suit of the National Biscuit Company against them. He said: "No, that is not right. We are going to continue to sell Shredded Wheat right along."

2. Later, as I was informed by the buyer, the Kellogg/salesman inquired who I was, indicating that he did not know at the time I was the National Biscuit Company salesman. I did not make the statement attributed to me in the said affidavit; I did not say that the Supreme Court had reversed the decision of the Court in Philadelphia; I did not say that the Kellogg Company would have to take Shredded Wheat off the market, and I did not say they would have to pay a million dollars in damages, nor did I make any statement in substance like those quoted in the said affidavit.

3. Upon a second interview with the buyer of the Haldas Store, I showed him a small clipping from a Philadelphia paper announcing that the Circuit Court of Appeals had reversed itself and found in favor of the National Biscuit Company. I made no further comment upon the decision either to the Haldas Store buyer or to any other customer of National Biscuit Company or of the Kellogg Company.

4. I have received and read the sales department circulars dated May 13 and May 26, 1927, respectively and have communicated the contents of the same to all of the salesmen under my jurisdiction, of whom there are six. From my knowledge of the activities of these salesmen I verily believe that the instructions contained in the said circulars have been strictly complied with, and that no derogatory statements of any kind concerning the Kellogg Company as to the effect of the

2238 *Affidavit of Benjamin L. Minges*

said decision have been made by me or any of my salesmen.

BENJAMIN L. MINGES.

Sworn to before me this first day of July, 1937.

GEORGE H. KLEIN,

Notary Public, Bronx County.

Bronx Co. Clerk's No. 58, Reg. No. 24-K-39.

N. Y. Co. Clerk's No. 447, Reg. No. 9-K-268.

Kings Co. Clerk's No. 47, Reg. No. 9188.

Commission expires March 30, 1939.

REFERENCE TO ARGUMENT.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS,
FOR THE THIRD CIRCUIT.

No. 5801. October Term, 1935.

National Biscuit Company,
Plaintiff-Appellant,

v.

Kellogg Company,
Defendant-Appellee.

And afterwards, to wit, the sixth day of July, 1937, come the parties aforesaid by their counsel aforesaid, and this case being called for hearing on appellee's motions, etc., before the Honorable Joseph Buffington, Honorable J. Warren Davis and Honorable J. Whittaker Thompson, Circuit Judges, and the Court not being fully advised in the premises, takes further time for the consideration thereof,

And afterwards, to wit, on the thirteenth day of July, 1937, come the parties aforesaid by their counsel aforesaid, and the Court, now being fully advised in the premises, enters the following orders:

ORDER,

IN THE UNITED STATES CIRCUIT COURT OF APPEALS,
FOR THE THIRD CIRCUIT.

No. 5801.

National Biscuit Company,
Plaintiff-Appellant,

v.

Kellogg Company,
Defendant-Appellee.

Before BUFFINGTON, DAVIS and THOMPSON, Circuit
Judges.

And now, to wit, July 13, 1937, after due consideration
and after hearing the arguments of counsel on
both sides, appellee's motion for an order restraining
and enjoining plaintiff-appellant, etc., is hereby denied.

By THE COURT,

BUFFINGTON,
Circuit Judge.

Order

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ORDER.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS,
FOR THE THIRD CIRCUIT.

No. 5801.

National Biscuit Company,
Plaintiff-Appellant,

v.

Kellogg Company,
Defendant-Appellee.

Before BUFFINGTON, DAVIS and THOMPSON, *Circuit Judges.*

And now, to wit, July 13, 1937, after due consideration and after hearing the arguments of counsel on both sides, appellee's motion for withdrawal of the opinion of this Court filed on April 12, 1937, etc., is hereby denied.

By THE COURT,

BUFFINGTON,
Circuit Judge.

2242 *Order Denying Petition for Rehearing*

**ORDER DENYING PETITION FOR
REHEARING.**

IN THE UNITED STATES CIRCUIT COURT OF APPEALS,
FOR THE THIRD CIRCUIT.

No. 5801. October Term, 1936.

National Biscuit Company,
Plaintiff-Appellant,

v.

Kellogg Company,
Defendant-Appellee.

SUR APPELLEE'S PETITION FOR REHEARING.

AND Now, to wit, July 13, 1937, after due consideration,
the petition of defendant-appellee for rehearing
in the above-entitled case is hereby denied.

Philadelphia,

By THE COURT,

BUFFINGTON,
Circuit Judge.

CLERK'S CERTIFICATE.

UNITED STATES OF AMERICA,
EASTERN DISTRICT OF PENNSYLVANIA, }
THIRD JUDICIAL CIRCUIT. } *Sct.:*

I, Wm. P. ROWLAND, clerk of the United States Circuit Court of Appeals for the Third Circuit, Do HEREBY CERTIFY the foregoing to be a true and faithful copy of the original transcript of record (Volumes I, II and III) and proceedings in this court (Volume IIIa) in the case of National Biscuit Company, Plaintiff-Appellant, v. Kellogg Company, Defendant-Appellee, No. 5801, on file, and now remaining among the records of the said court, in my office.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the seal of the said court, at Philadelphia, this
(Seal) eleventh day of August, in the year of our Lord one thousand nine hundred and thirty-seven and of the Independence of the United States the one hundred and sixty-second.

Wm. P. ROWLAND,
Clerk of the U. S. Circuit Court of Appeals, Third Circuit.



[fol. 2244] IN THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE THIRD CIRCUIT, OCTOBER TERM, 1935

No. 5801

NATIONAL BISCUIT COMPANY, Plaintiff-Appellant,

vs.

KELLOGG COMPANY, Defendant-Appellee

PETITION TO WITHHOLD INJUNCTION MANDATE

To the Honorable the Judges of the Circuit Court of Appeals:

Your petitioner, Kellogg Company, respectfully represents:

1. On April 12, 1937 this Court on a rehearing of its former decision, directed an interlocutory decree in the following language:

" * * * a decree will be entered vacating our former decree and reversing the decree of the District Court with directions to the court to enter a decree enjoining the defendant from the use of the name 'Shredded Wheat' as its trade name and from advertising or offering for sale its product in the form and shape of plaintiff's biscuit in violation of its trademark; and with further directions to order an accounting for damages and profits."

[fol. 2245] 2. Thereafter your petitioner duly moved this Court for rehearing of its said decision. The said rehearing was denied.

3. Thereafter your petitioner made application to the United States Supreme Court for the issuance of a writ of certiorari to review such interlocutory decision and the said Supreme Court declined to entertain the said writ and likewise denied a petition for rehearing and application to withhold its order denying the writ of certiorari.

4. Your petitioner believes that the Supreme Court of the United States declined to entertain the said writ upon the grounds as specified in the case of The Hamilton-Brown Shoe Company v. Wolf Brothers & Company, 240 U. S. 251, 258, namely, that the said decree being of an interlocu-

tory nature only, should not at this time be reviewed, but that such review, if any, should be withheld until the said decree became final upon the final accounting thereby ordered.

5. The issuance of an order herein and the enforcement of a mandate of injunction pending the accounting to be had between the parties, would be an extreme hardship to the petitioner. For this loss, pending final decree and possible review by the United States Supreme Court, no adequate compensation to your petitioner is possible.

6. The controversy involved in this litigation commenced in January, 1922, and petitioner has so far never been enjoined in the manufacture and sale of this product. A delay of the enforcement of such injunction pending the limited time requested can result in no harm to respondents. Petitioner [fol. 2246] is an old established concern, having been engaged in business through itself and predecessors for over thirty years, is amply financially responsible, and maintains plants, agencies, and distributing centers throughout the Nation and in Europe, and is fully able to answer for any damages that might result to respondents by reason of such stay. Counsel is now preparing for and will proceed diligently in the making and stating of such account in the form as directed by the decree.

7. There is now pending before the Privy Council at London an appeal from a decision of the Supreme Court of Ontario, Canadian Shredded Wheat Company, Ltd. v. Kellogg Company of Canada, Ltd., 1936 Ont. Rep. 613, which has been set for a hearing, as your petitioner is informed, by the said Privy Council for the 25th day of November, 1937, and which is an appeal by respondents herein from a judgment of the said Supreme Court of Ontario denying to the said respondents an injunction in the form directed by this Court in this case upon a practically identical state of facts. The Privy Council, as a court of last resort, is, therefore, now about to hear and determine the identical issue of law which under its rules of practice the Supreme Court of the United States declined to hear at an interlocutory stage of the proceedings.

8. In view of the instructions of the United States Supreme Court as outlined in John Simmons Company v.

Grier Brothers Company, 258 U. S. 82, the said stay is likewise requested until such time as the said Privy Council shall have passed upon the respondents' appeal which is now before it, for the reason that if that decision be affirmed, counsel intend to apply for a rehearing or review herein in [fol. 2247] the manner as indicated by the Supreme Court in such decision.

Wherefore, your petitioner prays that this Court in the exercise of its discretion and in accordance with the provisions of the Act of February 13, 1925, Chap. 229, Sec. 8 (d), 43 Stat. 936, withhold its injunction mandate pending the decision of the Privy Council and pending the accounting and the entry of final decree herein, or authorize an application to the District Court to stay the operation of the injunction.

And your petitioner will ever pray.

Kellogg Company, by Crichton Clarke, of Counsel.

[fol. 2248] STATE OF PENNSYLVANIA,
County of Philadelphia, ss:

Crichton Clarke, being duly sworn according to law, deposes and says that he makes this affidavit on behalf of petitioner, Kellogg Company, and is duly authorized to do so, that the facts stated in said petition are true to the best of his knowledge, information and belief and that said petition is presented to this Court in good faith and not for the purpose of delay.

Crichton Clarke.

Sworn to and subscribed before me this 10th day of November, A. D. 1937. John F. Solomon, Notary Public. My commission expires March 9, 1939.
(Seal.)

[fol. 2249] [Endorsed:] In the United States Circuit Court of Appeals for the Third Circuit. October Term, 1935. No. 5801. National Biscuit Company, Plaintiff-Appellant, vs. Kellogg Company, Defendant-Appellee. Petition to Withhold Injunction Mandate. Received & Filed Nov. 10, 1937. William P. Rowland, Clerk. Crichton Clarke, Attorney for Petitioner, 36 W. 44th Street, New York City.

[fol. 2250] UNITED STATES OF AMERICA, ss:

The President of the United States of America to the Honorable the Judges of the District Court of the United States for the District of Delaware, Greeting:

Whereas, lately in the District Court of the United States for the District of Delaware, before you or some of you, in a cause between National Biscuit Company, plaintiff below (appellant) and Kellogg Company, defendant below (appellee)—No. 980 in Equity—a decree was entered in said District Court on January 23, 1935 which decree is of record in the office of the clerk of said District Court, to which reference is hereby made, and the same is hereby expressly made a part hereof.

[fol. 2251] And whereas, in the present term of October, in the year of our Lord one thousand nine hundred and Thirty-six, the said cause came on to be heard before the said United States Circuit Court of Appeals on the said transcript of record and was argued by counsel:

On Consideration Whereof, it is now here ordered, adjudged and decreed by this court that the decree of the said District Court in this cause be, and the same is hereby reversed, with costs, with direction to the said District Court to enter a decree enjoining the defendant from the use of the name "Shredded Wheat" as its trade name and from advertising or offering for sale its products in the form and shape of plaintiff's biscuit in violation of its trademark: with further directions to the said District Court to order an accounting for damages and profits. And the said Plaintiff-Appellant, National Biscuit Company, recover against the said Defendant-Appellee, Kellogg Company in the sum of Ninety-Eight and 60/100 Dollars (\$98.60) for its costs herein expended and have execution therefor.

Philadelphia, April 12, 1937.

You, therefore, are hereby commanded that such execution and further proceeding be had in said cause, as according to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding.

Witness the Honorable Charles Evans Hughes, Chief Justice of the Supreme Court of the United States, at Phila-

adelphia, the 7th day of December, in the year of our Lord
one thousand nine hundred and thirty-seven.

Costs of Plaintiff-Appellant National Biscuit Company

Clerk,	\$78.60
Printing Record	\$
Attorney	\$20.00
	<hr/>
	\$98.60

Wm. P. Rowland, Clerk of the U. S. Circuit Court
of Appeals, Third Circuit.

[fol. 2252] **UNITED STATES CIRCUIT COURT OF APPEALS FOR
THE THIRD CIRCUIT**

No. 5801

NATIONAL BISCUIT COMPANY, Plaintiff-Appellant,
vs.

KELLOGG COMPANY, Defendant-Appellee

**PETITION OF PLAINTIFF-APPELLANT TO RECALL MANDATE AND
TO CLARIFY SAME—Filed March 4, 1938**

Thomas G. Haight, Drury W. Cooper, Charles A. Vilas,
Counsel for Plaintiff-Appellant.

[fol. 2253] **UNITED STATES CIRCUIT COURT OF APPEALS FOR
THE THIRD CIRCUIT**

No. 5801

NATIONAL BISCUIT COMPANY, Plaintiff-Appellant,
vs.

KELLOGG COMPANY, Defendant-Appellee
Petition

Petition of plaintiff-appellant, National Biscuit Com-
pany, for an order of this Court recalling its mandate is-

sued in the above entitled cause on December 8, 1937, and for clarification of said mandate.

Petitioner respectfully represents:

1. On April 12th, 1937, this Court filed its written opinion directing reversal of the judgment of the District Court of Delaware in the above entitled action and the issuance of an injunction. On December 8th, 1937, the mandate of this Court, in pursuance of its opinion, was duly issued and transmitted to the District Court whereby the District Court was directed to

"enter a decree enjoining the defendant from the use of the name 'Shredded Wheat' as its trade name and from advertising or offering for sale its product in the form and shape of plaintiff's biscuit in violation of its trade mark,"

[fol. 2254] and also to order an accounting for damages and profits.

2. On January 5th, 1938, in pursuance of said mandate, the District Court duly entered its decree, a true copy whereof is hereto attached and marked Exhibit A; and on January 7th, 1938, there was issued out of said Court a writ of injunction, a true copy whereof is hereto attached and marked Exhibit B, which said writ of injunction was duly served upon the defendant on January 8th, 1938.

3. Counsel for the defendant, Kellogg Company, during the arguments as to the form of the said decree and on other occasions has contended in the District Court and still contends that the effect of the said mandate and writ of injunction is to forbid the defendant from selling its product only when the trade name "Shredded Wheat" is applied to a biscuit in the form and shape of plaintiff's biscuit and is accompanied by a representation of a dish with biscuit in it. Defendant further contends that it is not enjoined from making its biscuit in the form and shape of plaintiff's biscuit nor from calling it "Shredded Wheat" unless at the same time it uses upon its cartons plaintiff's trade mark consisting of a dish with two biscuit in it. Defendant has expressed the intention in written and verified petitions filed with the District Court of continuing to manufacture and sell its biscuit in the form and shape of plaintiff's biscuit notwithstanding the decision and mandate of

this Court and the injunction issued pursuant thereto, and, [fol. 2255] as plaintiff is informed and believes, the defendant is now advertising and offering for sale its said biscuit made in the form and shape of plaintiff's biscuit in cartons closely resembling those used by it at the time of and after the bringing of this action.

That is to say, defendant so construes the mandate of this Court as to permit it to sell the same biscuit as it was selling before this Court's decision, and to call it "Shredded Wheat," provided only it does not mark the containing cartons with a dish with biscuit in it.

4. Plaintiff is further informed and believes that the District Judge for the District of Delaware is in doubt as to whether the construction placed by the defendant upon the mandate of this Court and the injunction issued pursuant thereto be not the correct construction as is evidenced by the following quotation from an oral argument which took place before the said District Judge on February 1st, 1938:

"The Court: Do you go this far, Mr. Vilas, that the defendant Kellogg is enjoined from making the pillow shaped biscuit?

"Mr. Vilas (plaintiff's counsel): There is no doubt about it. I do not know why they should use the language they do, if they did not mean what they said.

"The Court: There may be an honest difference right there."

5. The plaintiff is advised by its counsel and believes that it was the intention of this court clearly expressed in the said opinion of April 12th, 1937, that the defendant should be enjoined from doing each of the three things mentioned in that portion of the opinion quoted in para-[fol. 2256] graph 3 hereof, namely, that it was to be enjoined from using the words "Shredded Wheat" as its trade name, and also from advertising or offering for sale its biscuit in the form and shape of plaintiff's biscuit, and also from making use of the plaintiff's registered trade mark consisting of a dish with two biscuit in it, and plaintiff is further advised by its counsel and believes that unless the said mandate of this Court be promptly clarified the defendant intends to and will continue to manufacture, advertise and offer for sale its biscuit in the form and shape

of the plaintiff's biscuit to the great damage of the plaintiff.

6. The matter is of further importance because an accounting of profits and damages has been referred to a Master, but has not proceeded beyond the issuance of an order upon defendant to state its account of profits and damages; and the scope of the accounting will be obscure until the direction of this Court is made clear.

Wherefore, plaintiff prays that this Court forthwith enter its order recalling the said mandate for the purpose of clarification; and that it thereupon proceed to amend and clarify its said mandate in such manner and form as to set at rest any doubt which either of the parties or the District Judge may have concerning the meaning and intent of this Court's decision; and for such other and further relief in the premises as to the Court may seem just and proper.

Respectfully submitted, National Biscuit Company,
Plaintiff, by (Sgd.) Charles A. Vilas, Its Solicitor.

Dated March 4, 1938.

[fol. 2257] STATE OF NEW YORK,
County of New York, ss:

Charles A. Vilas, being duly sworn, deposes and says that he is one of the counsel for National Biscuit Company, plaintiff above named, and has been in charge of the above entitled case from its inception in 1932 and is familiar with all the proceedings had herein; that he has read the foregoing petition, knows the contents thereof and that the same is true except as to those matters therein stated to be alleged upon information and belief and as to those matters he believes it to be true; that the reason this verification is made by deponent and not by the petitioner is that the petitioner is a corporation of the State of New Jersey, and deponent is counsel therefor. This petition is interposed in good faith and not for the purpose of delay and the deponent believes that the said petitioner has good ground in law for presenting the same.

(Sgd.) Charles A. Vilas.

Sworn to before me this 4th day of March, 1938.
 Frederick C. Walter, Notary Public, Queens
 County. Queens Co. Clk's No. 1753 Reg. No. 1656.
 N. Y. Co. Clk's No. 214 Reg. No. 8W125. Commis-
 sion expires March 30, 1938. (Seal.)

[fol. 2258] Received Jan. 6, 1938. Cooper, Kerr & Dunham

EXHIBIT A

(Copy)

**IN THE DISTRICT COURT OF THE UNITED STATES FOR THE
 DISTRICT OF DELAWARE**

No. 980. In Equity.

NATIONAL BISCUIT COMPANY, Plaintiff,

v.

KELLOGG COMPANY, Defendant

And now, to wit, this—5th—day of January, A. D. 1938, the mandate of the United States Circuit Court of Appeals for the Third Circuit on the appeal of the plaintiff heretofore taken in the above entitled cause having been transmitted to the clerk of this court and filed herein on the eighth day of December, A. D. 1937 and the same having been brought to the attention of the court, in compliance therewith, it is now, on motion of Hugh M. Morris, Esq., solicitor for plaintiff,

Ordered, adjudged and decreed by the court as follows:

(1) That the decree of this court entered herein on the twenty-third day of January, A. D. 1935 dismissing the bill of complaint be and the same is hereby vacated and set aside and the bill of complaint reinstated.

(2) That a perpetual injunction issue out of and under the seal of this court directed to said defendant, Kellogg Company, its officers, agents, servants, employees and at- [fol. 2259] torneys and those in active concert or participating with them, its successors and assigns, restraining and enjoining it and them, and each of them, from the use

of the name "SHREDDED WHEAT" as its trade name and from advertising or offering for sale its product in the form and shape of plaintiff's biscuit in violation of its trade mark.

(3) That the plaintiff do recover from the defendant the gains, profits and advantages which the said defendant has derived, received, earned or made or which it shall derive, receive, earn or make by reason of the use by defendant of the name "SHREDDED WHEAT" as its trade name and, advertising or offering for sale its product in the form and shape of plaintiff's biscuit in violation of its trade mark, as well as any and all damages which the said plaintiff has sustained by reason of such use or either of them.

(4) That this cause be and the same is hereby referred to—Charles F. Richards, Esq., as special master to take, state and report to this court, with all convenient speed, an account of said profits and damages, and that upon said accounting the testimony heretofore taken by either party in this cause may be used by either party and considered by the master.

(5) That plaintiff have judgment against defendant for the costs awarded to it by the Circuit Court of Appeals for the Third Circuit in the sum of Ninety-eight Dollars and [fol. 2260] Sixty Cents (\$98.60) together with its costs in this court up to and including the entry of this decree, including costs incurred by the plaintiff for printing the transcript of record on appeal, said costs to be taxed by the clerk.

(6) That this court reserves for further consideration upon the coming in of the master's report all questions pertaining to costs hereinafter accruing and damages or profits.

(Sgd) John P. Nields, J.

A true copy. Attest: H. C. Mahaffy, Jr., Clerk. (Seal.)

[fol. 2261] Received Jan. 8, 1938. Cooper, Kerr & Dunham

EXHIBIT B

(Copy)

HMM/vcc. 1-1. 1/7/38

**IN THE DISTRICT COURT OF THE UNITED STATES FOR THE
DISTRICT OF DELAWARE**

No. 980. In Equity

NATIONAL BISCUIT COMPANY, Plaintiff,

v.

KELLOGG COMPANY, Defendant

UNITED STATES OF AMERICA

District of Delaware, ss:

The President of the United States of America to Kellogg Company, a Corporation of the State of Delaware, Greeting:

Whereas, in the above entitled cause, lately pending in the District Court of the United States for the District of Delaware, it was, on the fifth day of January, A. D. 1938, ordered, adjudged and decreed by the Court that a perpetual injunction issue out of and under the seal of said court directed to said defendant, Kellogg Company, its officers, agents, servants, employees and attorneys and those in active concert [fol. 2262] or participating with them, its successors and assigns, restraining and enjoining it and them, and each of them, from the use of the name "SHREDDED WHEAT" as its trade name and from advertising or offering for sale its product in the form and shape of plaintiff's biscuit in violation of its trade mark;

Now, therefore, know ye, that you, the said Kellogg Company, your officers, agents, servants, employees and attorneys and those in active concert or participating with you, your successors and assigns, and each of you, are hereby strictly restrained and enjoined under the pains and penalties that may fall upon you in case of disobedience from the use of the name "SHREDDED WHEAT" as your trade name

and from advertising or offering for sale your product in the form and shape of plaintiff's biscuit in violation of its trade mark.

Witness the Honorable John P. Nields, Judge of said court, at Wilmington, in said district, this seventh day of January, A. D. 1938, and the Independence of the United States of America the one hundred and sixty-second.

(Sgd.) H. C. Mahaffy, Jr., Clerk U. S. District Court, District of Delaware. (Seal.)

A true copy.

Attest:

H. C. Mahaffy, Jr., Clerk.

[fol. 2263] IN THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE THIRD CIRCUIT, OCTOBER TERM, 1938

No. 5801

NATIONAL BISCUIT COMPANY, Plaintiff-Appellant,

v.

KELLOGG COMPANY, Defendant-Appellee

Appeal from the District Court of the United States
for the District of Delaware

ORDER EXTENDING TERM—Filed March 5, 1938

The plaintiff-appellant in the above entitled matter having, on March 4th, 1938, regularly filed a petition and moved to recall the Mandate heretofore issued in the above entitled matter for clarification, and it being impossible for the Court to hear argument on the said petition and motion before the expiration of the existing Term;

It is therefore hereby Ordered that for the purpose of hearing argument on the said petition and motion and making all necessary orders in respect thereto, that the existing Term of this Court be and the same is hereby extended with respect to this cause for the purpose above mentioned; and this Court hereby retains jurisdiction of this cause for said purpose.

Philadelphia, March 5th, 1938.

J. W. Thompson, Circuit Judge.

[fol. 2264] UNITED STATES CIRCUIT COURT OF APPEALS FOR
THE THIRD CIRCUIT

No. 5801

NATIONAL BISCUIT COMPANY, Plaintiff-Appellant,
against

KELLOGG COMPANY, Defendant-Appellee

Filed March 11, 1938

SIR:

Please Take Notice that the annexed petition was filed by the plaintiff in this Court on March 4th, 1938 and that on March 11th, 1938 at 11 o'clock A. M., or as soon thereafter as counsel can be heard, the plaintiff will move the Court to grant it the relief asked for in the annexed petition, and such other and further relief as to the Court may seem just and proper.

Dated, March 5th, 1938.

Charles A. Vilas, Attorney for Plaintiff-Appellant,
Office & P. O. Address: No. 36 West 44th Street,
Borough of Manhattan, City of New York.

To Crichton Clarke, Esquire, Attorney for Defendant-Appellee, Office & P. O. Address: No. 36 West 44th Street, Borough of Manhattan, City of New York.

[fol. 2265.] [Endorsed:] Index No. 5801. Year —.
United States Circuit Court of Appeals for the Third Circuit.
National Biscuit Company, Plaintiff-Appellant,
against Kellogg Company, Defendant-Appellee. Notice of Motion.
Charles A. Vilas, Attorney for Plaintiff-Appellant
(Office and Post Office Address), 36 West 44th Street, Borough of Manhattan, New York City.

[fol. 2266] IN THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE THIRD CIRCUIT, OCTOBER TERM, 1935

No. 5801

NATIONAL BISCUIT Co., Plaintiff-Appellant,

vs.

KELLOGG Co., Defendant-Appellee

And afterwards, to wit, the 11th day of March, 1938, come the parties aforesaid by their counsel aforesaid, and this case being called for hearing on motion to recall mandate, before the Honorable Joseph Buffington, Honorable J. Warren Davis and Honorable J. Whitaker Thompson, Circuit Judges, and the Court not being fully advised in the premises, takes further time for the consideration thereof.

—
[fol. 2267] UNITED STATES CIRCUIT COURT OF APPEALS FOR
THE THIRD CIRCUIT

No.—

NATIONAL BISCUIT COMPANY, Plaintiff-Appellant,

v.

KELLOGG COMPANY, Defendant-Appellee

(a) DEFENDANT'S MOTION AND PETITION FOR REHEARING—
Filed March 21, 1938

W. H. Crichton Clarke, Edward S. Rogers, Robert T. McCracken, E. Ennalls Berl, Of Counsel for Defendant-Appellee.

[fol. 2268]

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[fol. 2270] UNITED STATES CIRCUIT OF APPEALS FOR THE
THIRD CIRCUIT

No.—

NATIONAL BISCUIT COMPANY, Plaintiff-Appellant,

v.

KELLOGG COMPANY, Defendant-Appellee

Defendant's Motion and Petition for Rehearing

May it Please the Court:

Plaintiff has petitioned this Court to recall its mandate herein and to send down a new mandate, in substance, enjoining defendant (a) from selling its small sized pillow shaped shredded wheat biscuit at all, (b) from calling any shape of biscuit by the "tradename" "shredded wheat" and (c) from displaying on its package a picture of a plate containing shredded wheat biscuit, or from doing any of these three acts.

The case came on for argument before Judges Buffington and Davis on March 11, 1938, Judge Thompson being absent, and the Court granted the defendant permission to present an alternative form of order and any motions or petitions desired to be presented on behalf of defendant.

(a) The jurisdiction of the Court to Entertain Plaintiff's petition.

The term of Court at which the order of this Court, dated April 12, 1937, was entered having long since expired and the mandate of this Court having gone down in December, 1937, and pursuant thereto a decree having been entered by the District Court in January, 1938, it is sub-[fol. 2271] mitted that there is grave doubt as to the jurisdiction of this Court to entertain plaintiff's petition.

Bronson v. Schulten, 104 U. S. 410, 415;

Hart v. Wiltsee, 25 Fed. (2nd) 863, (C. C. A. 1)
1928.

Reynolds v. Manhattan Trust Company, 109 Fed.
97 (C. C. A. 8) (1901);

Foster Bros. Mfg. Co. v. National Labor Relations
Board, 90 Fed. 2nd 948, (C. C. A. 4) (1937);

) Arcoil Mfg. Co. v. American Ins. Co., 87 Fed. 2d 206, 207 (C. C. A. 3rd) (1936);
E. G. Stande Mfg. Co. v. Labombardie, 247 Fed. 879, 880 (C. C. A. 1) (1918);
Hawkins v. C. C. C. & St. L. Ry. Co., 99 Fed. 32 323 (C. C. A. 7) (1900);
Casey v. Sterling Cider Co., 15 Fed. 2nd 5 (C. C. A. 1) (1926).

In fact, the exercise by this Court of such jurisdiction would be an exercise of original not appellate jurisdiction. The Court, in ruling upon appellant's petition, would not be reviewing any order, judgment or decree of the District Court. It would be changing the decree entered by the District Court, pursuant to the mandate of this Court, but not in conformity with any statute concerning appeals or review or conferring upon it jurisdiction so to do. There is no appeal pending in this Court from the decree of the District Court entered pursuant to the mandate. In fact, the Court is asked to enter an order in a case no longer pending here where its mandate has gone down to the lower court and has been literally executed by that court, and to exercise jurisdiction upon an original petition filed in this Court without a record of the proceedings had in the court below since the filing of the mandate there.

We were first informed on March 18th, 1938 that an ex parte order was obtained on March 5, 1938 extending the October 1937 term of the Court in this case until the disposition of the plaintiff's petition. A copy of this order is attached as Appendix B. We first procured a copy of this order on March 19, 1938. We have not had sufficient time to examine into the validity of this order, but that question probably is not important. For, while in form plaintiff seeks merely a clarification of the mandate [fol. 2272] inasmuch as the mandate follows precisely the opinion delivered at the March 1937 term, in substance what plaintiff seeks is a modification of the opinion and the order of this Court made at the March 1937 term long since expired. In fact, we submit that plaintiff's petition cannot be granted without a modification of the opinion and the order of reversal and remandment, otherwise the mandate will vary from the opinion and judgment. Under the authorities cited above, plaintiff's petition should not be granted.

(b) Defendant Petitions for a Rehearing

If, however, the Court decides to entertain plaintiff's petition and to determine it, the defendant requests a rehearing of this cause. In this connection, it is submitted there is the same jurisdiction in this Court to entertain a petition for rehearing now as there is to entertain and decide plaintiff's pending petition to recall the old mandate and send down a new mandate to the District Court.

Counsel are impelled further to urge a rehearing, by reason of the persuasive and highly authoritative opinion recently rendered by the Privy Council of Great Britain, Lords Atkin, Thankerton, Russell of Killowen, Wright and Maughan, in which that learned Court in passing upon the identical issues involved in this litigation and between subsidiaries of the same parties, holds that the words "Shredded Wheat" have not acquired a secondary meaning, and that the sale of defendant's biscuits under the designation "Kellogg's Shredded Whole Wheat Biscuit," either in or separate and apart from their cartons, does not constitute unfair competition with plaintiff or "passing off."

We request the Court to give attention particularly to the final paragraph of the opinion of the Privy Council, reading as follows:

"One further observation their Lordships desire to make. Litigation has taken place in the United States of America in which a company called National Biscuit Company sought to restrain a company called Kellogg Company from using the words 'Shredded Wheat'. The action was dismissed by decree of the U. S. District Court for the District of Delaware; and on appeal to the U. S. Circuit Court [fol. 2273] of Appeals for the Third Circuit, the decree was affirmed. Subsequently on reargument before the same Judges, that decision was reversed, and a decree was entered enjoining the defendant from the use of the name "Shredded Wheat" as its trade name, and from advertising or offering for sale its product in the form and shape of plaintiff's biscuit in violation of its trade mark. Their Lordships can only (but with the greatest respect for that Court) express the view that if the facts of that case were similar in all respects to the facts of the present case, they prefer the first judgment of the Circuit Court of Appeals to its later decision."

The issues in both cases are of law rather than fact and the facts of both cases are the same. In fact, in the American trademark registrations, plaintiff's predecessor actually disclaimed any exclusive rights in the name and form or shape of the pillow-shaped shredded wheat biscuit, as will presently appear. For the purposes of this case, the Canadian and American law should be the same, and defendant should have the same right to operate in the United States that it has in Canada under the Privy Council judgment.

As the Privy Council opinion by Lord Russell is a better petition for rehearing and a better brief for defendant than counsel could hope to write, we have attached the same hereto as Appendix A and have incorporated the same herein and we earnestly invite the attention of the Court thereto.

In any event, if the Court determines it has jurisdiction, it should either grant rehearing, or deny plaintiff's petition leaving the present mandate undisturbed.

I

The present mandate permits the defendant to make and sell the pillow shaped biscuit. If the Court decides to issue a new mandate, it also should provide that the defendant has the right to make and sell the pillow shaped biscuit.

If the defendant is to be enjoined from manufacturing and selling a small-sized pillow shaped shredded wheat biscuit, irrespective of the name applied thereto or the character of the carton containing the same, and irrespective of whether it ultimately goes to home or restaurant trade (an unprecedented form of injunction), such an injunction must be based solely on the principles of unfair competition on the theory that defendant was passing-off its biscuit as the biscuit of the plaintiff. Such an injunction would not be based upon any principles of trade name or trade mark.

Defendant contends that it should not be enjoined, and the mandate did not direct that it be enjoined, from manufacturing and selling a pillow shaped shredded wheat biscuit in the form, shape and size now being manufactured by it, for the following reasons:

1. As a matter of substantive law, defendant has a right to manufacture and sell a pillow shaped shredded wheat biscuit in the form, shape and size now being manufactured and sold by it because such a biscuit was formerly manufactured under the Perky patents which have expired, and the testimony in this case showed that such form is functional, and the District Court so found.

Privy Council Judgment, Appendix A;

Singer v. June, 163 U. S. 169;

Shredded Wheat Company v. Humphrey Cornell Company, 250 Fed. 960 (C. C. A. 2, 1918).

In the Humphrey Cornell case, relating to the right to sell shredded wheat biscuit in the pillow shaped form, the Court stated in part:

"It is in cases where the connotation of origin arises, not from verbal description, but only from the appearance of the article, that the trouble arises in application, because the appearance must in some way be changed, or the article must be wrapped or marked. Thus has arisen the principle often applied in this court that minor, or 'non-functional,' changes in appearance may be required, so long as the substantial elements are left in the public domain . . . Under [fol. 2275] the guise of protecting against unfair competition, we must be jealous not to create perpetual monopolies.

"We do not see any possible change in the appearance of the biscuit itself which would be of enough service to the plaintiff to justify its imposition upon the defendant. Concededly, variation could be enforced only in its form, color, or size. As to form, the plaintiff appears to us finally concluded by its own design patent. Whether or not the evidence might have allowed us to prescribe some variation in the form, had that form been only the result of the plaintiff's original adoption, we do not say. Fox v. Hathaway, 199 Mass. 99, 85 N. E. 417, 24 L. R. A. (N. S.) 900, suggests that we might have found a way out. But the plaintiff's formal dedication of the design is conclusive reason against any injunction based upon the exclusive right to that form, however necessary the plaintiff may find it for its protection. As to color, also, we feel ourselves limited, because, while the shade of brown depends upon the baking, the plaintiff's own biscuits vary within appreciable limits, and to require the defendant to adopt a shade different

enough for commercial distinction would be to force them to bake their biscuits so that they would be repellent to most tastes. It would, so far as we can see, in effect, either terminate or hopelessly cripple any competition between the two parties.

"With size it is perhaps different, for we are not satisfied that the added cost of turning out a smaller biscuit would be substantial, per pound of shredded wheat."

The defendant complied with the Humphrey-Cornell decision by packing all biscuit for both home and restaurant trade in distinctive cartons. Defendant went even further than that decision required it to go, by making a biscuit differing in size from plaintiff's original biscuit. The testimony shows that defendant's biscuit is small than plaintiff's original biscuit. Plaintiff's original biscuit is $\frac{3}{4}$ " x $2\frac{1}{2}$ ", and defendant's $2\frac{5}{8}$ " x $2\frac{1}{4}$ ". Plaintiff manufactured its biscuit only in the $3\frac{3}{4}$ " x $2\frac{1}{2}$ " size until five years after defendant's product was placed upon the market. Thereafter plaintiff manufactured a portion of its biscuit for restaurant trade of substantially the same size as defendant's, thus cancelling [fol. 2276] the difference in size between plaintiff's and defendant's biscuit. R. I., p. 204 (from the findings of the Trial Court). Of course, plaintiff cannot complain of similarity in size, when it is the imitator in that respect, and its imitation cancelled the size difference originally existing.

The unreversed findings of fact below hold clearly that the form of the biscuit as produced by the patent-expired machines is functional and is the mechanically necessary product of the patent-expired machines. The District Court held and other cases have also established as a fact (*Shredded Wheat v. Humphrey-Cornell*, 250 Fed. 960) that the rectangular shape of the product with shreds forming a truss-like arch between the sides is the only practical shape in which the biscuit can be made and the findings of the District Court in this respect were not reversed by this Court. The opinion in the Humphrey-Cornell case is the basis of a statement of the law by Nims on Unfair Competition and Trade Marks (3rd Edition), P. 936, as follows:

"The patents under which the Shredded Wheat Co., manufactured its biscuits had expired. While it was pos-

sible for it to compel competitors to market their biscuits in cartons which would differentiate them from its own biscuits, it was found impossible to change the appearance of the biscuits themselves so as to make them distinguishable. Defendant was ordered to mark by a wrapping, tag, or brand or by symbol impressed in the substance all of their biscuits which would reach the ultimate consumer outside the cartons. The injunction provided for relief for defendants at the end of six months, if, after a trial they showed they could not comply with this provision and continue in competition with plaintiff."

The necessary proof was supplied in this case, and plaintiff in effect conceded the fact by contending that defendant should make some other shape of biscuit because there was no other way than that which defendant had already used (difference in size), to distinguish the biscuit in issue.

Any other form of biscuit lacks the quality of strength, lightness and crispness which characterizes the regular [fol. 2277] product of the patent-expired machinery. The proof establishing this was so clear that the court below indicated its belief that if the same proof had been adduced in the Humphrey-Cornell case, the defendant there would not have been required even to mark its biscuit.*

*R. V. I, p. 221, from the opinion of the District Court:

"By making its biscuit substantially smaller than plaintiff's, and using individual cartons, defendant has met the requirements of the decree of the Circuit Court of Appeals for the Second Circuit in the Ross case (i. e. Shredded Wheat Co. v. Humphrey-Cornell). In this case the proof fully confirms the testimony of Andrew Ross that the biscuit itself cannot be branded or marked. With each biscuit distinctively marked by carton and by size, there can be no excuse for confusion or deception. Had the proof in this case as to marking been before the Court of Appeals in the Ross case the opinion of Judge Ward would doubtless have been the opinion of the Court."

R. V. I, p. 201, the Trial Court quoting from Judge Ward in Humphrey-Cornell:

"Moreover, I think that the form and size of the biscuit as always made by the complainant are functional, and that

The testimony in support of these conclusions is at R. II, pages 1119, 1131, and 1144.

It thus appears clearly that no other form or shape of the biscuit is practicable. The defendant having established the distinctive appearance of its biscuit by reducing its size has met the requirements of the Humphrey-Cornell case. This leaves the defendant with the indisputable and conceded right (plaintiff's brief on appeal p. 34, post, p. 21) to make and sell the biscuit.

But if there should be any doubt as to whether dissimilarity in size and in packaging sufficiently differentiates defendant's product from the plaintiff's, then it is submitted that the Court instead of enjoining defendant from selling the small pillow shaped form of biscuit, should specify such further precautions, if any, as would prevent alleged unfair competition in supplying hotel and restaurant trade, without harming the defendant in its indispu-[fol. 2278] table right to compete with plaintiff for such trade, and conditioned on plaintiff ceasing to supply the restaurant trade with a small sized biscuit copied after defendant's.

Even if the form of the biscuit should be determined to be non-functional, nevertheless defendant's use of the form should not be absolutely enjoined. In Coca-Cola Co. v. Gay-Ola Co., 200 Fed. 720 (C. C. A. 6th), it was determined that the color of an imitation product resembling Coca-Cola was not functional (200 Fed. 724) and was adopted for the purpose "of making the two articles look just alike" (200 Fed. 724). Yet the Court held that as to the bottling part of the output defendant could provide reasonably efficient means of notice and probably prevent deception by stamping and labeling the bottles with the name of the product (200 Fed. 725). Upon subsequent appeal (211 Fed. 942, 944) the product was allowed to be marketed in bottles prominently marked with the name of the product.

imitation of these features is no evidence of unfair competition. The form evidently tends to strengthen a product made out of such fragile material and the size is apparently the best fitted for use as a breakfast food on a saucer. I think the bill should be dismissed." Shredded Wheat Co. v. Humphrey-Cornell Co., 250 Fed. 960, 967.

In Coca-Cola Co. v. Koke Co., 254 U. S. 143 (another of the Coca-Cola cases), the Court held that "the product including the coloring matter is free to all who can make it if no extrinsic deceiving element is present". Note that this language was used regarding coloring matter which was not an essential ingredient of the compound.

Plaintiff's proposed form of mandate would absolutely enjoin the sale of defendant's small-sized pillow shaped biscuit even when sold to the ultimate consumer in a carton under the name of "Kellogg's Whole Wheat Biscuit" with the Kellogg name prominently displayed on the carton as the manufacturer. Such an injunction is not necessary to prevent unfair competition. It is necessary in order to give plaintiff a monopoly of the business. In the use of the pillow shape there is "no extrinsic deceiving element" under the Coca-Cola Co. v. Koke Co., 254 U. S. 143, 147; defendant therefore has the right to sell that shape of biscuit, particularly where sales are made in cartons labelled [fol. 2279] "Kellogg's Whole Wheat Biscuits" with the Kellogg name as manufacturer.

It was conceded by plaintiff at the March 11th, 1938 hearing that the carton now being used by defendant (a copy of which is submitted as Exhibit C) is non-deceptive and does not offend against plaintiff's rights. It appears, therefore, that biscuits sold for home consumption (which comprise approximately 97½% of the total biscuits sold) reach the ultimate consumer inside of non-deceptive cartons.

All of defendant's biscuit manufactured for consumption in public eating places are also packed in defendant's distinctive cartons containing two biscuits each, and in only about 2½% of the eating places are biscuits served in plates apart from the cartons.

With reference to defendant's right to sell this form of biscuit, we quote from the opinion of the Privy Council in Canadian Shredded Wheat Company, Limited, vs. The Kellogg Company of Canada Limited, decided February 4, 1938, 1938 All England Law Reports 618, and Appendix A:

"The plaintiff company however, claims as against Kelloggs a passing-off injunction based upon the allegation that Kellogg's biscuits are of such shape and size that hotel-keepers and restaurant-keepers could, if so minded, supply them in response to the request of a customer who, in asking

for shredded wheat, desired to be supplied with biscuits of the plaintiff company's manufacture. Their Lordships see no reason for granting any such relief, upon the evidence given in the present case. They are not satisfied that a person asking for shredded wheat will not have his request truly satisfied if the product shredded wheat, as manufactured by Kellogg or any other manufacturer, is supplied. Nor are they satisfied that a customer who really desires a biscuit of the plaintiff company's manufacture will necessarily be deceived by being offered a biscuit of the same shape *but perceptibly smaller*. Such likelihood of deception requires to be proved, and it is noticeable that no witness was shown a Kellogg's biscuit and asked whether he would have taken that to be a biscuit of the plaintiff's company's manufacture. The plaintiff company has not, in [fol. 2280] their Lordships' opinion, made out a case in these proceedings which would justify the granting of a passing-off injunction based solely on the form of the biscuit." (Emphasis ours).

We also invite the Court's attention to the testimony embodied in the findings of the Trial Court, as follows:

"Howard Duane, a witness on behalf of *plaintiff* testified as follows:

(Quoting from the opinion of the Court)

"X Q. You saw right away that the biscuit handed to you in its carton was not the biscuit you had been getting?

A. Immediately.

X Q. Did you eat it?

A. Yes.

X Q. Did you notice anything about the size when you took it out of the carton?

A. Yes, the biscuit was shorter than the shredded wheat biscuit.

X Q. You did not think that was any biscuit made by the National Biscuit Company, or the Shredded Wheat Company?

A. No, I did not. I knew it was not." (Italics ours.)

All other witnesses who were asked similar questions testified to the same effect, as the District Court found.

As before explained, the exact form and shape of the biscuit is the precise product of the machine. The only way

in which distinction between the products could be made was by making the biscuit smaller. This was done by defendant and for further reference thereto, defendant now submits to the Court herewith the actual biscuits made by the plaintiff and defendant, from which the size distinction will be clear. This element of the proof was likewise embodied in the findings of the lower court, in which the Court said:

"Plaintiff also has an individual carton carrying two biscuits indistinguishable in size from defendant's small biscuit, and first put upon the market five years after defendant originated and popularized the same size biscuit. It should be noted that defendant distinguished its biscuit [fol. 2281] from plaintiff's by making a different size, yet plaintiff wiped out the size distinction by duplicating defendant's small biscuit." (Italics ours.)

2. The mandate of this Court is alleged by plaintiff to be ambiguous, but we assert that such mandate, when read in connection with the opinion of the Court, does not prohibit the defendant from selling a pillow shaped biscuit of the form and shape of plaintiff's biscuit provided such manufacture and sale is not accomplished by means of the use of the term "Shredded Wheat" and by means of the use of plaintiff's alleged trade mark consisting of two biscuits in a bowl partially submerged in milk. Plaintiff, in effect, concedes this by petitioning for a new and different mandate. In no place does the Court's opinion state that the pillow shaped form of biscuit cannot be sold by the defendant.

On the contrary, the whole opinion seems to revolve around the use of "Shredded Wheat" as a trade name and the registered bowl trade-mark of the plaintiff rather than the form of the biscuit. On page 2 of its opinion, the Court says:

"Therefore, upon the expiration of the patent the defendant was free to adopt the name of 'Shredded Wheat' to designate its product with some adequate explanation that the product was made by it and not by the plaintiff."

In this connection the Court not only does not prohibit the manufacture of a biscuit in the form and shape of the plaintiff's but, on the contrary, by saying that the defend-

ant was free to adopt the name of "Shredded Wheat" it clearly indicates that the defendant was free to sell the product to which the Court recognized that the defendant had the right to apply that name.

On page 3 of the opinion, the Connecticut litigation is discussed. In that suit the plaintiff objected to the defendant's use of "Shredded Wheat". The suit was dismissed by the plaintiff without any stipulation that the defendant would cease to manufacture a biscuit in the same form and shape as that made by the plaintiff. Such a dismissal by the plaintiff constituted acquiescence, thereby recognizing that the defendant had the right to sell the pillow shaped biscuit, and as before stated this right was specifically conceded by the plaintiff on the first argument of the appeal. (Appellant's brief on Appeal, p. 34, post, 21.)

On page 4 of the opinion, the Court refers to the name and trade mark "as identifying plaintiff's biscuit," but not to the form of the biscuit as doing so.

The language used by this Court on pages 5 and 6 of its opinion on rehearing is as follows:

"For instance, the defendant called its product 'Kellogg's Whole Wheat Biscuit'. This is exactly what it is. It is a biscuit made from whole wheat by Kellogg."

This language indicates that the defendant is free to market a pillow-shaped biscuit under the name of "Kellogg's Whole Wheat Biscuit", and shows that the defendant's rights concerning the name of the biscuit are the only ones open to doubt. If the defendant can call its product "Kellogg's Whole Wheat Biscuit" it certainly must be assumed to have the right to sell the product to which it has the right to give the name. It is clear that marketing that same product under the term "whole wheat biscuit" was not prohibited by the Court.

The conclusion may definitely be drawn from the opinion that it is the name and not the form of the biscuit that appear to concern the Court. On page 6 of its opinion, the Court says:

"The case now stands in equity just as it would have stood if there had been no patent before 1912 and the plaintiff's competitors had sat by and allowed it from that time

on to build up at great expense a valuable good-will in the name." (Emphasis ours.)

[fol. 2283] This sentence definitely shows that the Kellogg Company has the right to sell a biscuit in the pillow shape and form because there is no patent to prevent such action. In the last sentence of the paragraph, the Court's opinion states that the adoption by any one of the name and form of the article which a competitor has been selling, tends to show a fraudulent attempt to gain the good-will enjoyed by such competitor. It is to be noted that the form is prohibited only when it is connected with an infringing name.

The use of "name and form" conjunctively in the next paragraph leads to the same conclusion. The Court's opinion states that the expiration of the patent allows the public to use the name which has been given to the patented article provided that this right be used within a reasonable time. It argues that the right to use that name is lost after the expiration of a reasonable time but it does not refer to a loss of the right to sell the patented article. This language does not suggest that the defendant is prohibited from selling the pillow shaped biscuit independently of some other action which the court disapproves.

On pages 7 and 8 of this Court's opinion, referring to the Dyanshine case, it is stated:

"We held that the defendant was guilty of unfair competition and enjoined it 'from using the words 'dye and shine' in any way, form, arrangement, or manner of spelling as the name, or as resembling a name of its product, leaving it free, of course, to use these words merely and exclusively in describing the qualities and characteristics of the product.' *This the defendant in the case at bar is free to do, but may not, as it has been doing, use the words 'Shredded Wheat' as the trade name of its product.*"

The Court's language clearly concedes to the defendant the right to use the words "shredded wheat" descriptively so long as they are not used as a trade name. This language also concedes that the defendant has a right to manufacture and sell "its product"; namely, a pillow-shaped biscuit.

[fol. 2284] In the long full paragraph on page 10 of the Court's opinion, the Court mentions that the expiration of the design patent did not confer on the defendant any rights

in the trade name or trademark of the plaintiff, but in no place does the Court prohibit the manufacture of the product of the defendant and its sale, if done without designating the product as shredded wheat and using plaintiff's alleged trade mark.

In the next paragraph of the opinion and also in the opinion on pages 5 and 11, "name and form," used conjunctively, appear. The conjunctive use of those words in those paragraphs again indicates that form alone was not intended to be prohibited.

A close reading of the Court's opinion as a whole indicates that it was not intended to prohibit the sale of the pillow shaped biscuit unless connected with the other features which the Court intended to prohibit.

The opinion of this Court which recognizes in so many places defendant's right to sell the pillow shaped biscuit should not after petition for certiorari has been submitted to the Supreme Court and after the expiration of the term at which the judgment of this Court was entered, be so radically changed as now to prohibit the exercise by the defendant of the right so recognized.

In view of the decision in the Humphrey-Cornell case and of the Privy Council in the Canadian Shredded Wheat case, it is submitted that if there be any doubt as to the meaning of the mandate in this case it should be resolved against the plaintiff, and that the defendant's right to sell a pillow shaped form of biscuit of a different size than that of plaintiff's biscuit should be upheld.

II

The Effect of the Denial of Certiorari by the Supreme Court

Judge Davis, at the hearing, asked a question as to the effect on the case of the denial of certiorari by the Supreme Court.

[fol 2285] A decree for injunction and accounting is interlocutory merely. A denial of certiorari for the review of an order of the Circuit Court of Appeals ordering such injunction and accounting does not preclude the Supreme Court after final decree upon the merits, including the accounting, and its affirmance by the Circuit Court of Appeals, to review, upon certiorari, the entire case, including

the former order of the Circuit Court of Appeals directing the injunction and accounting.

Hamilton Brown Shoe Co. v. Wolf Bros., 240 U. S.

251;

John Simmons Co. v. Grier, 258 U. S. 82.

Defendant believes that the Supreme Court may well have decided not to review this decision by certiorari at an interlocutory stage of the proceeding, but to withhold such review until completion of the accounting directed, in order that if such review were ordered, it might embrace any novel questions raised upon the accounting itself.

It may be likewise that the Supreme Court interpreted the opinion and judgment as not prohibiting the sale of the pillow-shaped form of biscuit.

III

Defendant's Petition for Rehearing

Defendant hereby petitions for rehearing upon the grounds set forth below.

Since the second decision of this Court, the Judicial Committee of the Privy Council, in the case of *The Canadian Shredded Wheat Company, Limited, v. The Kellogg Company of Canada Limited And Another*, decided February 4, 1938 (Privy Council Appeals No. 40 of 1937) involving the same issues, facts and law and subsidiaries of the same parties as are here involved, affirmed the judgments of the [fol. 2286] Supreme Court on Ontario (1936 Ont. Rep. 281) and the Court of Appeals of Ontario (1936 Ont. Rep. 613) dismissing the Canadian suit which corresponds with and was copending with this suit. (See Appendix A.) The judgment of the Privy Council was rendered on February 4, 1938, after this Court had made its second decision herein and the Privy Council reached the same conclusion which this Court reached in its first judgment. The Privy Council expressly states its preference for the first decision of this Court over its second one.

Comity and the judicial amenities alone would indicate that this Court should rehear the cause in view of the judgment of the Privy Council.

Bourjois Sales Corporation v. Abraham Dorfman,
273 N. Y. 167.

In this Dorfman case, the judgment of the Supreme Court of the United States was not any more binding upon the New York Court of Appeals than is the Privy Council judgment here, but the New York Court bowed to the Federal Supreme Court, and in this case the Privy Council judgment is submitted as a weighty, a worthy, an important, a highly persuasive ground for rehearing.

Including the Privy Council, twenty-three judges have passed on the issue whether the formerly patented design of the biscuit is in the public domain, and twenty-one judges have passed on the issue whether, the words "shredded wheat" are in the public domain or whether they are perpetual monopolies owned by plaintiff.* Three of these judges subsequently reversed themselves.

[fol. 2287] The decisions of twenty-one judges to the effect that the words "Shredded Wheat" are in the public domain are as follows:

Natural Food Co. v. Williams, 30 App. D. C. 348 (three Judges, besides the Examiner of Interferences and the Commissioner of Patents in the same case);

Kellogg Co. v. National Biscuit Co. (the Sherman Act case), 71 Fed. (2d) 662 (C. C. A. 2) (three Judges on appeal).

The present case. (Trial judge, and three Circuit judges on the first decision on appeal who subsequently reversed themselves.)

* In the matter of trademark No. 500,671, registered under name of Shredded Wheat Company Limited, Justice Bennett in the High Court of Justice, Chancery Division, decided on December 21, 1937, prior to the decision of the Privy Council in the Canadian Shredded Wheat Company, Limited, case, that the words "Shredded Wheat" had acquired a "secondary meaning and were properly registered as a trademark under the English trademark statute. That case is now pending on appeal in the English Court of Appeal where reversal is confidently anticipated in view of the later decision of the Privy Council ruling the words "Shredded Wheat" to be descriptive and not distinctive or possessed of a secondary meaning.

Canadian Shredded Wheat Co., Ltd. v. Kellogg Co. of Canada, Ltd. (1936, Ont. Reps. 281) and **Same v. Same**, 1936, Ont. Reps. 613 (the Canadian case) (One trial Judge and five Judges of the Court of Appeal of Ontario);

The Canadian Shredded Wheat Co., Ltd. v. Kellogg Company of Canada, Ltd., Privy Council Appeals, No. 40 of 1937 (Five Judges).

The decisions of twenty-three judges to the effect that the pillow shape or design is in the public domain are as follows:

Four judges in this case, three of whom subsequently reversed themselves; three in the Sherman Act case (Judge Caffey's decision in the District Court did not directly touch the issue), four Judges in the case of **Shredded Wheat Co. v. Humphrey-Cornell**, 250 Fed. 960 (C. C. A. 2), six Judges in the Canadian case, five Law Lords in the Privy Council, and Judge Kohlsaat, post, p. 19, all held that plaintiff did not have a monopoly of the form or shape of the biscuit.

We realize that in matters of intellectual conviction or law, questions may not be concluded by sheer weight of [fol. 2288] numbers, but certainly the grounds for further consideration are impressive.

Let us briefly consider these and other decisions which now have been followed by the Privy Council.

Plaintiff's predecessor was the owner of some forty-one patents on method and machines for shredding cooked but unleavened wheat and forming the same into rectangular biscuits of the well-known type and shape. The product was described as shredded wheat throughout the patents. One patent covered the exact shape or design of the biscuit itself; others covered machines whose sole function was to shred the wheat and form it into the identical shape of biscuit here in issue. The patents expired about 1912 and since that time, the product, machinery, design and description and patent-expired name have been in the public domain under long established law.

Singer v. June, 163 U. S. 169.

Dupont v. Waxed Products, 85 Fed. (2) 75 (C. C. A. 3) (Cert. denied, 57 Sup. Ct. 194).

Ameisite v. Interstate, 72 Fed. (2) 946, (C. C. A. 3).

Prior to defendant's entry into the field, the design, form and shape of the biscuit had been dedicated to the public as follows:

(a) In 1908, Judge Kohlsaat held that the Perky design patent No. 24,688, covering the design of biscuit here in issue, was invalid because of more than two years public use of the design before the patent application was filed. Here was a double dedication, first, by two years public use and, second, by invalidation of the design patent. Plaintiff's predecessor did not appeal from Judge Kohlsaat's judgment.

Natural Food Co. v. Henry P. Bulkley, et al., N. Dist. of Illinois, Eastern Div. No. 28,530.

(b) Plaintiff disclaimed the design or representation of the biscuit as a trademark in its trademark registrations Nos. 85,186 (V. 4, p. 197) and 216,593 (V. 4, p. 205).

(c) In 1918, the Circuit Court of Appeals for the Second Circuit held that the right of a competitor of plaintiff's to make the identical size, shape and appearance of biscuit was "indubitable."

[fol. 2289] Shredded Wheat Co. v. Humphrey Cornell, 250 Fed. 960.

(d) The expiration of the patents on the machines for making the identical shape of biscuit here in issue and on the method for making the product itself ended the patent monopoly.

Singer v. June, *supra*.

The public ownership of the words "shredded wheat" was just as strongly established as the public ownership of the design, prior to defendant's entry into the field, for the following reasons:

(a) The expiration of the patents in which the words were used descriptively placed such words in the public domain.
Singer v. June, *supra*.

(b) A few months after the enactment of the Trademark Act of February 19, 1905, which permitted registration of descriptive terms used exclusively for ten years next preceding the passage of the Act, plaintiff's predecessor sought to register the words "Shredded Whole Wheat" as its

trademark, but the Court of Appeals of the District of Columbia affirmed the decision of the Patent Office and held that the words were descriptive of the patented product; were not used as a trademark and, in fact, were incapable of exclusive appropriation. This case also held that the concurrent use of the words by Williams prevented the exclusive appropriation of such words as a trademark.

Natural Food Company v. Williams, 30 App. D. C. 348.

(c) In 1912, plaintiff registered the picture of its factory as its trademark "for shredded wheat in Class 46, foods and ingredients of foods", No. 89,071 (V. 4, p. 199). Plaintiff's present claim is that its trademark for shredded wheat is shredded wheat. Its registration No. 89,071 states that "No claim is made herein to the words 'The Home of Shredded Wheat,'" which appear above the factory picture. Here is [fol. 2290] a double disclaimer of the words "Shredded Wheat," first by using them to describe the product itself and second by disclaiming the words as part of the phrase "The Home of Shredded Wheat."

Such a disclaimer is irrevocable.

Beckwith v. Commissioner of Patents, 252 U. S. 538; Holzapfels v. Rahtjens, 183 U. S. 1.

(d) The words "shredded wheat were used throughout the patents, advertisements and trademark registrations to describe and name the product and process.

(e) Even plaintiff conceded defendant's right to manufacture the patent-expired biscuit in the pillow form in its main brief on appeal in this Court, by asking, at p. 34:

"2. That the defendant be enjoined from manufacturing or selling or offering for sale Whole Wheat Biscuit in substantially the form and shape of plaintiff's biscuit unless each biscuit be banded or marked in such a distinctive manner as to state clearly that it is a product of the defendant and not of the plaintiff." (Italics ours.)

Defendant thus was well protected by sound and established law and prior adjudications when it began to make this publicly owned product and design under this publicly owned name and to market it in fair and distinctive cartons.

Briefly stated, the second decision of the Court of Appeals,

particularly if it is to be amended as requested by plaintiff, would accomplish the following unusual and, we submit, erroneous results:

It would disregard the ruling of the Privy Council and of the Circuit Court of Appeals of the Second Circuit that the right of a competitor of plaintiff's to make the patent-expired pillow-shaped shredded wheat biscuit here in issue is indubitable (*Shredded Wheat Co. v. Humphrey-Cornell*, 250 Fed. 960); disregard the ruling that plaintiff's effort to monopolize the manufacture and sale of shredded wheat is [fol. 2291] unlawful under the Sherman Anti-Trust Act (*Kellogg Company v. National Biscuit Company*, 71 Fed. (2d) 662); disregard the ruling of the Court of Appeals of the District of Columbia, that shredded wheat is incapable of exclusive appropriation as a trademark (*Natural Food Company v. Williams*, 30 App. D. C. 348); disregard the rulings of the Supreme Court of Ontario and the Court of Appeal of Ontario that by virtue of patent expirations defendant is free to make shredded wheat and call it Kellogg's Shredded Wheat in Canada; disregard the ruling of the Privy Council on the same law and facts and its expressed preference for the first judgment of this Court over its second; disregard the ruling of the Supreme Court of the United States holding that after patents expire anyone is free to make the patent expired product and call it by the name universally applied to it during the life of the patents and in the patents themselves (*Singer v. June*, 163 U. S. 169); disregard the ruling of the same Court holding that perpetual monopolies may not be set up under the guise of trademarks (*Delaware & Hudson Canal Co. v. Clark*, 13 Wall. 311; *Standard Paint v. Trinidad*, 220 U. S. 446); disregard the ruling of the same Court (Mr. Justice Sutherland) holding that relief in fair trade cases cannot exceed the wrongs of the defendant and that even if the defendant practiced deception, it could not thereby be deprived of its right to combine chocolate and quinine (*Warner v. Ely Lilly & Company*, 265 U. S. 526); and disregard the ruling of the same Court that so-called trademarks, once disclaimed in statutory registrations, cannot thereafter be reclaimed (*Beckwith v. Commissioner of Patents*, 252 U. S. 538, *Holzapfels v. Rahtjens*, 183 U. S. 1; *Saxlehner v. Wagner*, 216 U. S. 375).

Finally it would disregard the Constitution and the Sherman Anti-Trust Act. The latter prohibits all monopolies

except those based on patents and copyrights and the former permits only patent and copyright monopolies and those only for a limited time and authorizes only Congress and not the Courts to grant or extend them.

Surely such wholesale disregard of long standing and well established precedents and of important principles of law in the fields of patents, trademarks, fair trade and monopoly, and in the light of a dissent so powerful as that of [fol. 2292] the Privy Council, should not be lightly undertaken and a rehearing is respectfully requested. Certainly, to broaden the mandate in the very face of the Privy Council judgment to the exact contrary and after the order for a mandate had been the subject of certiorari proceedings in the Supreme Court, would be an action so unusual as at least to be preceded by the amenity of a rehearing.

Conclusion.

Until plaintiff asked this Court to broaden the mandate so as to enjoin defendant from selling a pillow shaped biscuit at all or under any name or in any kind of a carton, the furthest any judge had gone in attempting to restrain use of the pillow shape or form by any one except plaintiff was the injunction of Judge Thomas in the District Court in the Humphrey-Cornell case. Judge Thomas restrained use of the form unless each biscuit was marked or tagged individually, irrespective of whether it was in a carton and irrespective of whether the defendant could mark each biscuit at all or whether it could remain in business if it tagged a food product with a glued on label or band—which in any event a restaurant waiter could tear off just as easily as the customer could.

But the Court of Appeals of the Second Circuit, on appeal from that ruling, held that as to biscuits reaching the consumer in cartons (either large or small) no other marking than the carton was required. It held that as to restaurant biscuit (at that time displayed in large glass globes containing biscuits without cartons) the defendant should attempt to mark or band the biscuit and if it could not do so without competitive handicap or hardship, it was given leave to apply back to the Court. The Court held that no restriction could be put on defendant, the com-

mercial effect of which would be to destroy defendant's "indubitable" right to compete.

Judge Nields held that defendant's product was incapable of being passed off as plaintiff's and that no passing off had been proved. He also held that it had been proved that no marking was possible other than what defendant worked [fol. 2293] out; namely by making a small biscuit and putting it in a distinctive carton for the restaurant trade. This Court did not reverse that finding of fact which bars the broad injunction that plaintiff now seeks.

The Privy Council after five days of argument, carefully considered both decisions of this Court and expressed its preference for the first decision and dissented in toto from the second opinion. The general principles of judicial comity suggest that the careful consideration given to both decisions of this Court by the Privy Council should be reciprocated before this Court should either enter a new mandate or adhere to the old one.

We respectfully submit that there could hardly be a stronger authority for a rehearing than the Privy Council judgment on the same principles of law, the same issues and subject matter and between subsidiaries of the same parties.

Respectfully, W. H. Crichton Clarke, Edward S. Rogers, Robert T. McCracken, E. Ennals, Berl, of Counsel for Defendant.

Certificate.

I, W. H. Crichton Clarke, certify that I am one of the counsel for Kellogg Company, the defendant in the above entitled cause, and that in my opinion the annexed Petition and Motion are well founded in law and fact and that the same are not interposed for the purpose of delay.

Crichton Clarke.

[fol. 2294] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1935

No. 5801

NATIONAL BISCUIT COMPANY, Plaintiff-Appellant,

v.

KELLOGG COMPANY, Defendant-Appellee.

Appeal from the District Court of the United States for the District of Delaware

OPINION SUR PLAINTIFF-APPELLANT'S PETITION TO RECALL AND CLARIFY MANDATE, AND DEFENDANT-APPELLEE'S PETITION FOR REHEARING—Filed May 5, 1938

Before Buffington, Davis and Thompson, Circuit Judges
DAVIS, Circuit J.:

"On April 12, 1937, during the March Term of this court, a decree was entered, pursuant to an opinion filed the same day, reversing with costs a decree of the United States District Court for the District of Delaware, which dismissed the appellant's bill of complaint, and containing a direction [fol. 2295] to the District Court to enter a decree "enjoining the defendant (appellee) from the use of the name 'Shredded Wheat' as its trade name and from advertising or offering for sale its product in the form and shape of plaintiff's biscuit in violation of its trade-mark; with further directions to the said District Court to order an accounting for damages and profits". Subsequently a petition for rehearing was filed by appellee and denied in due course. A petition for certiorari was then presented to the Supreme Court of the United States and denied in October, 1937, during the October Term of this court. This was followed by a petition to the Supreme Court for a rehearing and by petitions to this court and the Supreme Court that injunctive relief be withheld pending a further application for certiorari, which appellee stated that it intended to make after a final decree following an accounting had been entered in the District Court and presumably finally passed upon by this court. All of these petitions were

denied during the October Term, 1937, of this court. On December 7, 1937, this court issued its mandate in the exact language, except as to costs, of the order of April 12, 1937 above quoted. Appellant then applied to the District Court to enter a final decree. This was done, but the District Court, in the parts of the decree which dealt with the injunction and the recovery of damages and profits, except for the usual provisions in such decrees enjoining officers, agents, etc., followed the exact language of the mandate. Appellee contended before the District Court and this court that the opinion, order and mandate of this court meant that appellee could sell and offer for sale its biscuit in the usual pillow-shape form, provided it did not place on the cartons or in advertising matter what has been referred to in this case as the plaintiff's "two-biscuit-in-a-dish" trade mark, and apparently contended that it [fol. 2296] could likewise use the words "Shredded Wheat" unless in connection with that trade mark. Because the District Court was apparently in doubt as to exactly what the mandate intended to enjoin, and because the defendant had expressed a determination to advertise and sell biscuits in the pillow-shape form, appellant, before the expiration of the October, 1937, term, at which the mandate was issued, applied to this court to recall its mandate and clarify it.

We thought that, when our opinion was read as a whole, we had made it perfectly clear that what we intended to enjoin was the use of the name "Shredded Wheat" as a trade name and the advertising and selling of biscuits in the pillow-shape form, irrespective of whether the two-biscuit-in-a-dish trade mark were employed in connection with either the use of the name or the sale or advertising of the biscuit in the pillow shape form. This was the construction which the appellee placed on the opinion and order of April 12, 1937, in its petition for rehearing to this court and appellant says that it placed the same construction upon them in its various petitions to the Supreme Court. It so admitted before this court at the hearing to recall the mandate. Appellee in those petitions doubtless placed upon the mandate what it believed to be its proper construction and its changed view adopted after the mandate of this court had issued was apparently due to the exigencies of its position rather than to any real belief that the opinion of this court left any doubt as to what was meant. The

language at the end of the opinion and in the order and mandate is poorly phrased. We intended to enjoin the use of the words "Shredded Wheat" as a trade name, the advertising and sale of biscuits in the pillow-shape form, and the use of the two-biscuit-in-a-dish trade mark, separately or together.

[fol. 2297] At the hearing to recall and clarify the mandate, counsel for appellant submitted an order which it requested the court to make. Counsel for appellee was asked if he wished to submit an alternative form of order. He said that he did and was given 10 days in which to do so. Instead of presenting such an order, he has filed a printed petition of 23 pages, in which he has asked for a rehearing of the whole case and questions the jurisdiction of this court to entertain appellant's petition.

As appellant's petition seeks only a clarification of the mandate, and as it was presented before the expiration of the term at which the mandate was issued, we have no doubt of our right to entertain it and grant the relief sought. *Bronson v. Schulten*, 104 U. S. 410; Marion County Court, W. Va. v. Ridge, et al., 13 Fed. (ed) 969. It is equally clear that this court is without jurisdiction to entertain appellee's petition for rehearing. It was not presented, nor was permission given to present it, within the term when the order of April 12, 1937 was made, nor within the term when the Supreme Court denied the petition for certiorari and the petition for rehearing nor within the term when the mandate was issued. *Arcoil Mfg. Co. v. American Eq. Assur. Co.*, 87 Fed. (2d) 206 (C. C. A. 3); *Foster v. N. L. R. B.* 90 Fed. (2d) 948 (C. C. A. 4); *Bronson v. Schulten*, supra; Marion County Court, W. Va. v. Ridge, et al., supra. The petition for rehearing therefore must be denied for lack of jurisdiction.

But even if we had jurisdiction to consider it, we see no reason why it should be granted. Nothing new is presented except that in February, 1938, the British Privy Council in *Canadian Shredded Wheat Co. Ltd. v. Kellogg Company of Canada, Ltd.* reached, it is claimed, a different conclusion from that of this court. Even if the record in [fol. 2298] the two cases were the same, the latter decision does not persuade us that the conclusion at which we arrived was wrong. We are advised that the British High Court of Justice on a full record reached a different con-

clusion from that of the British Privy Council as to the registerability of "Shredded Wheat" as a trade name under the English statute.

The only remaining question is whether, in view of the fact that the order of April 12, 1937 did not specifically provide for an injunction against the violation of the two-biscuit-in-a-dish trade mark (although it was intended to do so) we have any jurisdiction to amend the mandate so as to include specifically such a provision. As there may be some doubt on this question, we will not amend the mandate so as to provide a specific injunction against the use of the two-biscuit-in-a-dish trade mark. Its use on a carton or in advertising matter, when the defendant is not permitted to use the word "Shredded Wheat" as a trade name or to advertise or sell biscuits in the pillow-shape form, would manifestly be so improper and so likely to mislead that we will assume that the appellee will not use it.

An order will be made recalling for clarification the mandate, as requested in appellant's petition and motion.

A true Copy. Teste:

_____, Clerk of the United States Circuit Court
of Appeals for the Third Circuit.

[fol. 2299] IN THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE THIRD CIRCUIT, OCTOBER TERM, 1935

No. 5801

NATIONAL BISCUIT COMPANY, Plaintiff-Appellant,

vs.

KELLOGG COMPANY, Defendant-Appellee

Appeal from the District Court of the United States for the
District of Delaware

ORDER RECALLING AND CLARIFYING MANDATE—Filed May 5,
1938

This cause coming on to be heard on the petition and motion of plaintiff-appellant National Biscuit Company, filed on March 4, 1938, for an order of this Court recalling its Mandate issued in the above entitled cause on December

8, 1937, in order that the same might be clarified, and having been argued by counsel:

On consideration whereof, it is now here ordered, adjudged and decreed by this court as follows:

(1) That its said Mandate be and the same is hereby recalled for the purpose of clarification; and

(2) That the said Mandate be clarified so as to direct the United States District Court for the District of Delaware to enter a decree, in the usual form, enjoining the defendant Kellogg Company (1) from the use of the name "SHREDDED WHEAT" as its trade name, (2) from advertising or offering for sale its product in the form and shape of plaintiff's biscuit, and (3) from doing either; and adjudging and decreeing, in the usual form, that plaintiff recover from said defendant profits and damages by reason of defendant's use of the said trade name and the use of the said pillow-shape form of biscuit, or either of them.

Philadelphia, May 5th, 1938.

J. Warren Davis, Circuit Judge.

[fol. 2300] IN THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE THIRD CIRCUIT, OCTOBER TERM, 1935

No. 5801

NATIONAL BISCUIT CO., Plaintiff-Appellant,

vs.

KELLOGG CO., Defendant-Appellee

SUR PETITION FOR REHEARING

And now, to wit, May 5, 1938, after due consideration, the petition of defendant-appellee for rehearing in the above-entitled case is hereby denied.

Philadelphia, — — — ,

J. Warren Davis, Circuit Judge.

Endorsements: Order Denying Petition for Rehearing of Defendant-Appellee. Received & Filed May 5, 1938.
Wm. P. Rowland, Clerk.

[fol. 2301] IN THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE THIRD CIRCUIT, OCTOBER TERM, 1935

No. 5801

NATIONAL BISCUIT COMPANY, Plaintiff-Appellant,
vs.
KELLOGG COMPANY, Defendant-Appellee

Appeal from the District Court of the United States for
the District of Delaware

PETITION FOR REHEARING—Filed May 13, 1938

The Court has made and filed three decisions herein and three orders or judgments based thereon. The first decision and judgment affirmed the District Court, the second reversed the District Court and directed the entry of a judgment which has been heretofore understood as a three part judgment covering the words "SHREDDED WHEAT" the pillow form of biscuit and the so-called plate trade-mark.

The third judgment recalls the mandate and directs the entry of a new District Court decree enjoining only the use of the words "SHREDDED WHEAT" and the pillow form of biscuit and specifically omitting any injunction as to the so-called plate trade-mark.

The defendant-appellee respectfully hereby petitions the Court for a rehearing and reversal of the second and third [fol. 2302] decisions of the Court and of the judgments or orders entered or to be entered thereon.

As to the second decision and judgment of the Court defendant-appellee respectfully renews and re-submits its first and its second petitions for rehearing herein, hereby specifically incorporating them herein with the same force and effect as though copied at length herein.

The mandate to the District Court based on the second decision and judgment has now been recalled and is now in this Court and defendant-appellee therefore hereby re-submits its said first and second petitions for rehearing, earnestly submitting that the Court has jurisdiction to consider and grant the same.

As to the third decision and judgment of this Court based thereon, defendant-appellee assigns as a ground for rehearing:

1. The objections to jurisdiction averred in its second petition for rehearing.
2. The objection that the third decision and judgment of the Court is not a mere clarification of its second decision and judgment, but is a new and materially different judgment directing a two part injunction instead of the previous three part injunction and changing the injunction as to the pillow form of biscuit in substantial and material respects.
3. That the second decision and judgment characterized in the third decision as "poorly phrased" is not such a definite and distinct order as is necessary to serve as a lawful judgment of the Court.
4. That the Court has as much jurisdiction to grant a rehearing at this time as it has to change the second judgment [fol. 2303] in the material and substantial respects directed by the third order.

W. H. Crichton Clarke, Attorney for Defendant-appellee. E. E. Berle, Robert T. McCracken, Of Counsel.

I further certify that the foregoing petition is well founded in law and is not interposed for the purpose of delay.

W. H. Crichton Clarke, Attorney for Defendant-Appellee.

[fol. 2304] UNITED STATES CIRCUIT COURT OF APPEALS FOR
THE THIRD CIRCUIT

No. 5801

NATIONAL BISCUIT COMPANY, Plaintiff-Appellant,
against

KELLOGG COMPANY, Defendant-Appellee

SIR:

Please Take Notice that on the 13th day of May, 1938, at the opening of Court, at 11 o'clock in the forenoon of said day, or as soon thereafter as counsel can be heard, the de-

fendant-appellee will move this Court for an order staying the issuance of its mandate herein to be issued pursuant to the order of this Court made and dated the 5th day of May, 1938.

The grounds of said application are set forth in the annexed affidavit of Crichton Clarke, Esq., sworn to the 11th day of May, 1938, and the said defendant-appellee will likewise apply for such other, further or different relief as to the Court may seem just and proper.

Yours, etc., Crichton Clarke, Attorney for Defendant-Appellee, Office and P. O. Address: No. 36 West 44th Street, Borough of Manhattan, City of New York.

To Charles A. Vilas, Attorney for Plaintiff-Appellant, 36 West 44th Street, Borough of Manhattan, City of New York.

[fol. 2305] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 5801

NATIONAL BISCUIT COMPANY, Plaintiff-Appellant,
against

KELLOGG COMPANY, Defendant-Appellee

STATE OF NEW YORK,
County of New York, ss:

Crichton Clarke being duly sworn deposes and says:
I am an attorney and counselor at law and of counsel for the defendant-appellee in the above entitled action.

This affidavit is made in support of the annexed notice of motion for an order staying the issuance of the mandate herein to be issued pursuant to the order of this Court, dated May 5, 1938, and is made in response to the plaintiff-appellant's motion for immediate issuance of said mandate without the customary thirty days stay.

The original mandate of this Court was issued and transmitted to the District Court on the 8th day of December, 1937, and during the October Term of this Court.

On the 5th day of March, 1938, plaintiff-appellant moved this Court for an order recalling the said mandate which came on for argument on the 11th day of March, 1938, and was granted by this Court pursuant to its order dated May 5, 1938, in and by which order this Court directed the issuance of a mandate in certain other and different language [fol. 2306] from that embodied in the mandate of December 8, 1938.

Pursuant to the directions of said order of May 5, 1938, the original mandate of December 8, 1937, having been duly recalled has now been returned by the District Court to this Court for its consideration, and no new mandate has issued out of this Court pursuant to its order of May 5, 1938.

It is the intention of the defendant-appellee to petition the Supreme Court for leave to present an application for a rehearing of its petition for certiorari on the merits of the controversy, which, as I am advised, should be presented on or before the 23rd day of May, 1938.

Such petition for rehearing is now in the process of preparation, and as counsel for the defendant-appellee, I have relied upon the usual practice of this Court to grant an automatic stay of thirty days before the issuance of the mandate. The application of plaintiff-appellant for the immediate issuance of the mandate is not supported by any affidavits setting forth the grounds for such unusual relief. It would appear justifiable to assume that the plaintiff-appellant desires to forestall the proposed application to the Supreme Court to rehear or to deprive defendant-appellee of its right to apply to the United States Supreme Court for a writ of certiorari.

As counsel for the defendant-appellee, I desire to set before the Supreme Court the clear and indisputable conflict between the decision of this Court of April 12, 1937, and the decision of the Judicial Committee of the House of Lords of Great Britain, and to point out the clear identity of the issues involved between this case and the case before the Privy Council.

I desire further to point out to the Supreme Court that the opinion of Mr. Justice Bennett of the High Court of Justice of Great Britain which is said to be in conformity

with the opinion of this Court relates solely to the application of the trademark statutes of Great Britain and involved no element of unfair competition, and that, further, the judgment of the High Court of Justice was rendered prior to the sweeping decision of the Privy Council, and that the decision of the Privy Council is such that there is grave doubt that the judgment of the High Court of Justice is sustainable upon appeal.

As further reason for granting the application for a stay herein, I wish to present to the Court a copy of a letter written by me on the 6th day of May, 1938, to Mr. William P. Rowland, as Clerk of this Court, which is as follows:

"May 6, 1938.

Mr. W. P. Rowland, Clerk of the United States Circuit Court of Appeals, for the Third Circuit, Philadelphia, Pa.

Re National Biscuit Co. v. Kellogg Co., No. 5801.

DEAR MR. ROWLAND:

I have your letters of May 5th and 6th and enclose herewith my check for \$5.60 to cover the cost of the opinion and order of May 5th.

I assume that the usual practice of your Court in withholding the new mandate for thirty days will be followed, as this will give the appellee an opportunity to make a new application to the Supreme Court for a writ of certiorari, [fol. 2308] and it is our intention to do this. If my assumption that the new mandate will be withheld the same as any other mandate is not correct, please let me know in order that we may take such other steps as may be necessary in attempting to preserve defendant's subject matter of this litigation, pending the intended application for certiorari.

This cause has now been involved in the appellate court for several years and there could seem to be no reason why the defendant should not have an opportunity to apply to the Supreme Court without having its business, valued at more than a million dollars, destroyed in the interim.

Very truly yours, Crichton Clarke."

On the same day, associate counsel for the defendant-appellee, Ward & Gray, wrote to Mr. Rowland as follows:

"May 6, 1938.

William P. Rowland, Esq., Clerk, U. S. Circuit Court of Appeals, 304 Custom House, Second and Chestnut Sts., Philadelphia, Pa.

DEAR SIR:

I acknowledge receipt of your letter of May 5th, inclosing copies of opinion in National Biscuit Company vs. Kellogg Company, No. 5801, and in accordance therewith I am inclosing our check for \$5.00.

I assume that the mechanics which will be involved in carrying into effect the opinion of the Circuit Court of Appeals filed yesterday will be through the entry of an order providing for the recall of the mandate from the District Court, and after its actual recall, the issuance of a further order providing for a new or clarified mandate.

It is conceivable that the appellee may be advised to [fol.2309] apply for a certiorari upon the issuance of the order providing for the new mandate, and in that event we will desire an opportunity to apply to the Circuit Court of Appeals for a stay as to the new mandate, pending the disposition of the petition for certiorari.

If I am correct in my understanding of the procedure and the appellee should desire to make an application for certiorari and a stay, I should appreciate it if you would advise me when the order for the mandate is entered and before the actual issuance of the mandate, so that we may have an opportunity to follow our course in this regard.

Very truly yours, Ward & Gray."

The reason for the two letters above referred to was that counsel might be assured that the usual practice of this Court would be followed and that the usual thirty days stay on the new mandate would be automatically applied, to provide time for a rehearing or for an application to the Supreme Court for a writ of certiorari.

On May 9, 1938, in furtherance of the intention of the defendant-appellee to apply for a writ of certiorari, I wrote a letter to Mr. Rowland as follows:

"May 9, 1938.

"Mr. William P. Rowland, Clerk of the United States Circuit Court of Appeals for the Third Circuit, Philadelphia, Pa.

Re National Biscuit Co. v. Kellogg Co., No. 5801

DEAR MR. ROWLAND:

[fol. 2310] With further reference to the above matter, defendant-appellee has decided to present an application for certiorari to the United States Supreme Court to review the last order of this Court, declining to entertain the petition for rehearing and recalling and modifying the mandate.

Will you please, therefore, cause to be printed and certified the requisite number of copies of the proceedings in the Circuit Court subsequent to those heretofore printed for use in the Supreme Court as Volume IIIA of the record. There need be printed only the petition of appellant to recall and clarify the mandate, dated March 5th, and our petition for rehearing filed March 21st and briefs in connection with these matters and also the judgment and order of the Circuit Court of May 5th.

Very truly yours, Crichton Clarke."

My intention in writing this letter was in order to conform to the practice of this Court, which as I understand it, is to stay the issuance of the mandate for thirty days, and then if notified that application for a writ of certiorari is pending further to stay the mandate until such application is made and determined.

On behalf of the defendant-appellee, I now ask that the usual practice be followed and that the defendant appellee be granted the usual stay of thirty days within which to present to the Supreme Court an application for rehearing.

As above stated, the mandate has now been recalled and is before this Court, and the cause is wholly pending in this Court. The motive of plaintiff-appellant in moving that the usual practice be set aside and that the new mandate issue immediately can be only for the purpose of de-

priving defendant-appellee of its right to the usual relief [fol. 2311] and to a review of these proceedings by certiorari.

This cause has been pending for six years and there is no conceivable reason why a delay of thirty days in order to permit review of the last determination of this Court should act in any way to prejudice the plaintiff.

On behalf of the defendant-appellee, therefore, I respectfully request this Court that it stay the issuance of its new mandate herein for a period of thirty days, from the 5th day of May, 1938, for the purpose of allowing the defendant-appellee to petition the Supreme Court for a reargument of its application for a writ of certiorari.

Crichton Clarke.

Sworn to before me this 11th day of May, 1938.

Naev W. Goldberg, Notary Public. Kings. Co.
No. 670, Reg. No. 00419. Comm. Expires March
30, 1940.

[fol. 2312] [Endorsed:] United States Circuit Court of Appeals for the Third Circuit. National Biscuit Company, Plaintiff-Appellant, against Kellogg Company, Defendant-Appellee. Notice of Appellees Motion for Stay of Mandate and Affidavit. Crichton Clarke, Attorney for Defendant-Appellee, 36 West 44th Street, Borough of Manhattan, New York City.

[fol. 2313] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1938

No. 5801

NATIONAL BISCUIT CO., Plaintiff-Appellant,

vs.

KELLOGG CO., Defendant-Appellee

And afterwards, to wit, on the 13th day of May, 1938, come the parties aforesaid by their counsel aforesaid, and this case being called for hearing on appellant's motion for immediate issuance of mandate and appellee's motion for stay of mandate, before the Honorable Joseph Bumington,

Honorable J. Warren Davis, and Honorable J. Whitaker Thompson, Circuit Judges,

Whereupon the Court ordered that a mandate in amended form issue forthwith.

[fol. 2314] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1935

No. 5801

NATIONAL BISCUIT Co., Plaintiff-Appellant,
vs.

KELLOGG Co., Defendant-Appellee

SUR PETITION FOR REHEARING

And now, to wit, May 16, 1938, after due consideration, the petition of Defendant-Appellee filed May 13, 1938, for rehearing in the above-entitled case is hereby denied.

Philadelphia, ——————

Per Curiam, Buffington, Circuit Judge.

Endorsements: Order Denying Defendant-Appellee's Petition for Rehearing. Received & Filed May 16, 1938.
Wm. P. Rowland, Clerk.

[fol. 2315] UNITED STATES OF AMERICA, ss:

The President of the United States of America to the Honorable the Judges of the District Court of the United States for the District of Delaware, Greeting:

Whereas, lately in the District Court of the United States for the District of Delaware, before you or some of you, in a cause between National Biscuit Company, plaintiff below (appellant) and Kellogg Company, defendant below (appellee)—No. 980 in Equity—a decree was entered in the said District Court on January 23, 1935, which decree is of record in the office of the Clerk of the said District Court, to which reference is hereby made, and the same is hereby expressly made a part hereof.

as by the inspection of the transcript of the record of the said District Court, which was brought into the United States Circuit Court of Appeals for the Third Circuit by virtue of an appeal by plaintiff, agreeably to the Act of Congress, in such case made and provided, more fully and at large appears.

[fol. 2316] And whereas, in the term of October, in the year of our Lord one thousand nine hundred and thirty-six, the said cause came on to be heard before the said United States Circuit Court of Appeals on the said transcript of record and was argued by counsel:

And Whereas, On Consideration Whereof, it was, on April 12th, 1937, ordered, adjudged and decreed by the said United States Circuit Court of Appeals that the decree of the said District Court in this cause be, and the same was thereby reversed, with costs, and with direction that said District Court should enter a decree as hereinafter provided;

And Whereas, the mandate of this Court to the District Court of the United States for the District of Delaware was withheld pending consideration of a petition for rehearing and the disposition of a petition for writ of certiorari and a petition for rehearing on said petition for certiorari and certain other petitions of defendant;

And Whereas, on December 7th, 1937, upon the denials of the said various petitions, the mandate of this Court issued to the said District Court;

And Whereas, in the Term of October 1937 a motion and petition were presented by the said plaintiff to recall the said mandate for clarification, which said motion and petition were granted and an order entered recalling said mandate and directing that the same be clarified in certain respects;

On Consideration Whereof, it is now here ordered, adjudged and decreed by this Court that the said mandate of this Court issued on December 7th, 1937, be and the same is hereby recalled for the purpose of clarification and, in lieu of the directions therein contained, the following shall be and are the directions to the said District Court, viz.: that the said decree of the said District Court in this cause be, and the same is hereby reversed, with costs, and the said District Court is directed to enter a decree, in the

usual form, enjoining the defendant Kellogg Company (1) from the use of the name "SHREDDED WHEAT" as its trade name, (2) from advertising or offering for sale its product in the form and shape of plaintiff's biscuit, and (3) from doing either; and adjudging and decreeing, in the usual form, that plaintiff recover from said defendant profits and damages by reason of defendant's use of the said trade name and the use of the said pillow shape form of biscuit, or either of them; and that the said plaintiff, National Biscuit Company, recover against the said defendant, Kellogg Company, in the sum of One Hundred Eight and 60/100 Dollars (\$108.60) for its costs herein expended and have execution therefor.

Philadelphia, May 5, 1938.

You, therefore, are hereby commanded that such execution and further proceeding be had in said cause, as according to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding.

Witness, the Honorable Charles Evans Hughes, Chief Justice of the Supreme Court of the United States, at Philadelphia, the 16th day of May, in the year of our Lord one thousand nine hundred and thirty-eight.

Costs of Plaintiff-Appellant, National Biscuit Co.

Clerk	\$88.60
Printing Record	\$. . .
Attorney	\$20.00
	<hr/>
	\$108.60

Wm. P. Rowland, Clerk of the U. S. Circuit Court of Appeals, Third Circuit.

[Endorsed:] Original File No. 5801. U. S. Circuit Court of Appeals, Third Circuit. No. 11, Oct. Term, 1936. National Biscuit Company, Plaintiff-Appellant, vs. Kellogg Company, Defendant-Appellee. Copy of Amended Mandate.

[fol. 2317] UNITED STATES OF AMERICA,
Eastern District of Pennsylvania,
Third Judicial Circuit, set:

I, William P. Rowland, Clerk of the United States Circuit Court of Appeals for the Third Circuit, do hereby

certify the foregoing to be a true and faithful copy of the original additional proceedings in this Court since the certification of August 12, 1937, in the case of National Biscuit Co., Plaintiff-Appellant, vs. Kellogg Co., Defendant-Appellee, No. 5801, on file, and now remaining among the records of the said Court, in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this 17th day of May, in the year of our Lord one thousand nine hundred and thirty-eight and of the Independence of the United States the one hundred and sixty-second.

Wm. P. Rowland, Clerk of the U. S. Circuit Court of Appeals, Third Circuit. (Seal United States Circuit Court of Appeals, Third Circuit.)

[fol. 2318] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF DELAWARE

No. 980. In Equity

NATIONAL BISCUIT COMPANY, Plaintiff,

v.

KELLOGG COMPANY, Defendant

And now, to wit, this—5th—day of January, A. D. 1938, the mandate of the United States Circuit Court of Appeals for the Third Circuit on the appeal of the plaintiff heretofore taken in the above entitled cause having been transmitted to the clerk of this court and filed herein on the eighth day of December, A. D. 1937 and the same having been brought to the attention of the court, in compliance therewith, it is now, on motion of Hugh M. Morris, Esq., solicitor for plaintiff,

Ordered, Adjudged and Decreed by the court as follows:

(1) That the decree of this court entered herein on the twenty-third day of January, A. D. 1935 dismissing the bill of complaint be and the same is hereby vacated and set aside and the bill of complaint reinstated.

(2) That a perpetual injunction issue out of and under the seal of this court directed to said defendant, Kellogg Company, its officers, agents, servants, employees and at-

torneys and those in active concert or participating with them, its successors and assigns, restraining and enjoining it and them, and each of them, from the use of the name "SHREDDED WHEAT" as its trade name and from advertising [fol. 2319] or offering for sale its product in the form and shape of plaintiff's biscuit in violation of its trade mark.

(3) That the plaintiff do recover from the defendant the gains, profits and advantages which the said defendant has derived, received, earned or made or which it shall derive, receive, earn or make by reason of the use by defendant of the name "SHREDDED WHEAT" as its trade name and, advertising or offering for sale its product in the form and shape of plaintiff's biscuit in violation of its trade mark, as well as any and all damages which the said plaintiff has sustained by reason of such use or either of them.

(4) That this cause be and the same is hereby referred to Charles F. Richards, Esq., as special master to take, state and report to this court, with all convenient speed, an account of said profits and damages, and that upon said accounting the testimony heretofore taken by either party in this cause may be used by either party and considered by the master.

(5) That plaintiff have judgment against defendant for the costs awarded to it by the Circuit Court of Appeals for the Third Circuit in the sum of Ninety-eight Dollars and Sixty Cents (\$98.60) together with its costs in this court up to and including the entry of this decree, including costs incurred by the plaintiff for printing the transcript of record on appeal, said costs to be taxed by the clerk.

[fol. 2320] (6) That this court reserves for further consideration upon the coming in of the master's report all questions pertaining to costs hereinafter accruing and damages or profits.

(Sgd.) John P. Nields, J.
A true copy. Attest: H. C. Mahaffy, Jr., Clerk. (Seal)

[fol. 2321] [Endorsed:] U. S. District Court, District of Delaware, No. 980. In Equity. National Biscuit Company, Plaintiff, v. Kellogg Company, Defendant. Interrogatory Decree. Filed January 5, 1938. (Sgd.) H. C. Mahaffy, Jr., Clerk.

[fol. 2322] IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF DELAWARE

No. 980. In Equity

NATIONAL BISCUIT COMPANY, Plaintiff,

v.

KELLOGG COMPANY, Defendant

And now, to wit, this 19th day of January, A. D., 1938, upon reading and considering the motion of the defendant by E. Ennals Berl, Esq., its solicitor, to amend the decree entered herein on the fifth day of January, A. D. 1938, by the deletion therefrom of the words "or either of them" at the end of paragraph (3) of said decree, it is

Ordered by the Court that said decree of January 5, A. D. 1938, be and hereby is amended by striking out paragraph (3) thereof and inserting in lieu thereof the following paragraph:

(3) That the plaintiff do recover from the defendant the gains, profits and advantages which the said defendant has derived, received, earned or made or which it shall derive, receive, earn or make by reason of the use by defendant of the name "SHREDDED WHEAT" as its trade name and from advertising or offering for sale its product in the form and shape of plaintiff's biscuit in violation of its trade mark; and that the plaintiff also recover from the defendant any and all damages which it may have sustained by reason of the use by defendant of the name "SHREDDED WHEAT" as its trade name and from advertising or offering for sale its product in the form and shape of plaintiff's biscuit in violation of its trade mark.

[fol. 2323] This order does not interpret or construe the mandate of the appellate court but seeks merely to have paragraph (3) and all other parts of the decree conform to that mandate.

(Sgd.) John P. Nields, J.

A True Copy. Attest: H. C. Mahaffy, Jr., Clerk. (Seal.)

[fol. 2324] [Endorsed:] U. S. District Court, District of Delaware. No. 980. In Equity. National Biscuit Company, Plaintiff, v. Kellogg Company, Defendant. Order

Amending Order of January 5, 1938. Filed January 19, 1938. (Sgd.) H. C. Mahaffy, Jr., Clerk.

[fol. 2325] IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF DELAWARE

No. 980. In Equity

NATIONAL BISCUIT COMPANY, Plaintiff,

v.

KELLOGG COMPANY, Defendant

UNITED STATES OF AMERICA,
District of Delaware, ss:

The President of the United States of America to Kellogg Company, a Corporation of the State of Delaware, Greeting:

Whereas, in the above entitled cause, lately pending in the District Court of the United States for the District of Delaware, it was, on the fifth day of January, A. D. 1938, Ordered, Adjudged and Decreed by the Court that a perpetual injunction issue out of and under the seal of said court directed to said defendant, Kellogg Company, its officers, agents, servants, employees and attorneys and those in active concert or participating with them, its successors and assigns, restraining and enjoining it and them, and each of them, from the use of the name "SHREDDED WHEAT" as its trade name and from advertising or offering for sale its product in the form and shape of plaintiff's biscuit in violation of its trade mark;

Now, Therefore, Know Ye, that you, the said Kellogg Company, your officers, agents, servants, employees and attorneys and those in active concert or participating with [fol. 2326] you, your successors and assigns, and each of you, are hereby strictly restrained and enjoined under the pains and penalties that may fall upon you in case of disobedience, from the use of the name "SHREDDED WHEAT" as your trade name and from advertising or offering for sale your product in the form and shape of plaintiff's biscuit in violation of its trade mark.

Witness the Honorable John P. Nields, Judge of said court, at Wilmington, in said district, this seventh day of

January, A. D. 1938, and the Independence of the United States of America the one hundred and sixty-second.

(Sgd.) H. C. Mahaffy, Jr., Clerk U. S. District Court,
District of Delaware. (Seal.)

[fol. 2327] UNITED STATES OF AMERICA,
District of Delaware, ss:

I, Henry C. Mahaffy, Jr., Clerk of the District Court of the United States for the District of Delaware, do hereby certify that I have carefully compared the foregoing writing with the original Injunction issued in the case of National Biscuit Company, Plaintiff v. Kellogg Company, Defendant, No. 980 In Equity with Marshall's return of service thereon, and find the same to be a true and correct copy of said original injunction and Marshall's return so full and complete as the same now remains on file in my office.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said court, at Wilmington, in said district, this sixteenth day of May, A. D. 1938.

H. C. Mahaffy, Jr., Clerk. (Seal of the District Court in Delaware.)

[fol. 2328] [Endorsed:] U. S. District Court, District of Delaware. No. 980. In Equity. National Biscuit Company, Plaintiff, v. Kellogg Company, Defendant. Injunction. Filed January 19, 1938. (Sgd.) H. C. Mahaffy, Jr., Clerk.

DISTRICT OF DELAWARE, ss:

I hereby certify and return that at Wilmington, in said District, on the 8th day of January, A. D. 1938, I served the within Injunction on the within named Kellogg Company, defendant, by delivering a true copy of the same to Alfred Jervis, Secretary of The Corporation Trust Company, said The Corporation Trust Company being resident agent for said defendant company in the State of Delaware, the president of said defendant company then and there residing without the State of Delaware.

So Answers.

Austin D. Smith, United States Marshal, by (Sgd.)
Gove S. Lynch, Gove S. Lynch, Deputy.

(5740)

[fol. 2329] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1937

No. 2

ORDER ALLOWING CERTIORARI—Filed May 31, 1938

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Stone and Mr. Justice Roberts took no part in the consideration or decision of this application.

[fol. 2330] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1937

No. 56

ORDER ALLOWING CERTIORARI—Filed May 31, 1938

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Stone and Mr. Justice Roberts took no part in the consideration or decision of this application.

(6540)